92-1236

No._____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

UNIT RIG INC., TEREX CORPORATION,
AND MRL ACQUISITION CORPORATION,

Petitioners,

v.

JOHN W. WHALEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Age Discrimination in Employment Act permits a private discrimination action in a United States District Court where the plaintiff failed, as required by the Act and most circuits, to name the defendant as a respondent in the administrative charge the plaintiff filed with the Commission.

2. Whether the Age Discrimination in Employment Act permits a failure to hire claim in the United States District Court when the plaintiff failed, as required by the Act and most circuits, to assert failure to hire in the administrative charge the plaintiff filed with the Commission.

3. Whether the Age Discrimination in Employment Act permits a private discrimination action in a United States District Court where the defendant did not have an opportunity to settle the dispute through conciliation, conference and persuasion because the plaintiff failed to name the defendant as a respondent in the administrative charge filed with the Commission.

4. Whether a plaintiff, in order to state a claim for failure to hire under the Age Discrimination in Employment Act and in most circuits, must first apply for the position with the company which purchased the assets of the plaintiff's previous employer.

PARTIES TO THE PROCEEDING

Petitioners:

Unit Rig is an unincorporated division of Terex Corporation,

Terex Corporation is the parent corporation with the following subsidiaries:

Clark Material Handling Company; Fruehauf Trailer Corporation; Terex Equipment, Limited.; Unit Rig (Australia) Pty. Limited; and Unit Rig (Canada) Limited.

Unincorporated divisions of Terex Corporation are:

Koehring Cranes and Excavators, Northwest Engineering Company, Mark Industries, and Unit Rig.

MRL Acquisition Company has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

Respondent:

John W. Whalen

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 974 F.2d 1248 (10th Cir. 1992). It affirms the judgment of the United States District Court for the Northern District of Oklahoma entered on jury verdict. A copy of that opinion is attached as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 10, 1992. On September 24, 1992, Petitioner timely filed a Petition for Rehearing. The Court below entered an Order denying the Petition for Rehearing on October 20, 1992. This Petition for Writ of Certiorari is filed within ninety days of that date. The jurisdiction of this Court to review the Judgment on Petition for Writ of Certiorari rests upon 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Age Discrimination in Employment Act ("ADEA")
29 U.S.C.A § 621-634

29 U.S.C.A. § 623. **Prohibition of age discrimination**

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C.A. § 626(d)

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a

charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed --

> (1) within 180 days after the alleged unlawful practice occurred; or
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 C.F.R. § 1626.6

Form of charge.

A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing.

29 C.F.R. § 1626.8

Contents of charge; amendment of charge.

(a) In addition to the requirements of § 1626.6, each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge;

(2) The full name and address of the person against whom the charge is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;

(4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6.

(c) A charge may be amended to clarify or amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not again be referred to the appropriate State agency.

42 U.S.C.A. § 2000e-5. **Enforcement provisions**

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment

agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall

be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

STATEMENT OF THE CASE

INTRODUCTION

Petitioners request the Court to review a published opinion of the Tenth Circuit Court of Appeals. Under this decision an employer in the Tenth Circuit can face federal litigation under the ADEA on a claimed wrongful act which (1) was never raised at the administrative level, (2) against an employer never charged at the administrative level and (3) never given the opportunity for conciliation (4) for refusal to hire an individual who never expressed his desire for the job over which he later sues. In the Third, Fourth, Fifth, Sixth, Seventh, Eighth or Ninth Circuits the same employer, under the same facts, would face no such litigation.

Petitioners contend that the documents Whalen filed with the Oklahoma Human Rights Commission ("OHRC") were insufficient to constitute an administrative charge against them and thus Whalen failed to meet a condition precedent to the filing of the suit. Whalen's OHRC charge (1) did not name the Petitioners as Respondents; (2) did not raise a failure to hire claim against Petitioners; (3) Petitioners never received notice of the age discrimination charge; and (4) Petitioners had no opportunity for conciliation.

SUMMARY OF FACTS

This suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., arises from John W. Whalen's ("Whalen") termination from employment by Unit Rig and Equipment Company ("URE"), on December 30, 1988. The basic facts are as follows:

Whalen, age sixty-three, who had been employed by URE as controller, was terminated when Terex Corporation ("Terex"), acting through MRL Acquisition Corporation ("MRL"), acquired the assets of URE and formed Unit Rig ("Unit Rig"), an unincorporated division of Terex. Terex

followed its established procedure of placing its own people in the top financial positions and transferred another financial employee from within Terex, Bill Schein, age thirty-two, who was given the title of controller.

Whalen never applied for any position with Unit Rig, nor did he ever inform anyone with Unit Rig or Terex that he had an interest in the controller position or other permanent employment with Unit Rig. Whalen accepted a temporary assignment for a 60 day period with the new company. When offered this assignment Whalen stated only, "I need the work."

On October 20, 1988, Whalen, with the assistance of his attorney, prepared and filed with the Oklahoma Human Rights Commission ("OHRC") Age Complaint Intake Questionnaires, which included the Age Complaint Affidavit and Layoff Form. Whalen stated that he was discharged from employment with URE on July 14, 1988. In the Age Complaint Affidavit included in the Age Complaint Intake Questionnaires, Whalen stated, inter alia, that his complaint was being filed against Unit Rig and Equipment Co., MRL Acquisition Corp., Terex Corp. and Unit Rig, Inc., for the reason that these entities acted in concert to unlawfully terminate his employment on the basis of his age. He did not state in the Age Complaint Intake Questionnaires that he was complaining because he was not hired by Unit Rig, Terex or MRL.

On December 30, 1988, prior to the completion of the administrative procedures, Whalen filed his action in the United States District Court for the Northern District of Oklahoma against URE, Unit Rig, Terex, and MRL. In Count I, he alleged that he was discharged from his employment with URE on July 14, 1988, because of his age, in violation of 29 U.S.C. § 623(a). In Count II, he alleged that MRL as the agent of Terex, refused to hire him as controller for Unit Rig Inc. because of his age, in violation of the ADEA.

On January 9, 1989, after filing this action, Whalen,

with the help of his lawyer, filed an Age Official Complaint Form, which was his formal charge against URE only, alleging age discrimination because of his discharge as controller of URE. Nowhere on any document completed by Whalen did he state that he was complaining because he was not hired by Unit Rig, Terex or MRL.

On March 31, 1989, the Equal Employment Opportunity Commission ("EEOC") mailed a notice of charge of discrimination to Joe B. Freeman of URE stating that Whalen had filed a charge against URE for age discrimination and requesting a response from URE. No notice of Whalen's charge was given to Unit Rig, Terex or MRL.

On April 17, 1989 the EEOC informed Whalen and Freeman that it had terminated its investigation because Whalen had filed a lawsuit.

On May 22, 1989, Whalen and URE filed a joint stipulation dismissing with prejudice Count I of the Complaint and the counterclaim. Thus, only Whalen's action for failure to hire against Unit Rig, Terex and MRL continued.

Unit Rig, Terex and MRL filed a Motion for Summary Judgment in which they raised the administrative filing issues which was denied by the trial court in its Order of April 17, 1990 (attached as Appendix C).

During the jury trial, on motions for directed verdict and for Judgment Notwithstanding the Verdict or in the Alternative, a Motion for New Trial, Unit Rig, Terex and MRL raised the administrative filing issues, which motions were overruled. The court entered judgment in favor of Whalen on December 13, 1990, (attached as Appendix D).

The appellate court affirmed the trial court's decision. See Opinion of United States Court of Appeals for the Tenth Circuit, John W. Whalen v. Unit Rig, Inc. Terex Corporation, and MRL Acquisition Corporation, No. 91-5069, September 10, 1992 (attached as Appendix A); and Order on Petition for Rehearing, John W. Whalen v. Unit Rig, Inc. Terex

Corporation, and MRL Acquisition Corporation, No. 91-5069 (10th Cir., October 20, 1992) (attached as Appendix B).

Appellant's Motion for Stay of Mandate Pending Petition for Writ of Certiorari was denied on November 5, 1992, and mandate was issued on that date.

Existence of Jurisdiction Below

The United States District Court for the Northern District of Oklahoma exercised jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331.

Jurisdiction of the United States Court of Appeals for the Tenth Circuit is predicated upon 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit should be reviewed because the conflict between the circuits presents two clear choices for this Court with respect to the law on the administrative filing issues addressed by the Tenth Circuit in Whalen. The Court can adopt the Tenth Circuit resolution of the issues, which will foster litigation and discourage alternative means of dispute resolution, or it can adopt the majority view which will quell litigation by requiring alternative means of dispute resolution as mandated by Congress and the ADEA, which is much less time and resource-consuming on an overwhelmed and understaffed judiciary and much less expensive to the litigant employees and employers. The majority view does not place a heavy burden on plaintiffs and their lawyers. It merely requires them to follow the clear conditions precedent to the filing of an action in the United States District Court pursuant to the ADEA, to wit, a valid administrative charge, which includes the claim on which the district court action is based and the named respondents on whom the action is brought, so as to provide notice and an opportunity for conciliation as mandated by Congress and the ADEA.

As demonstrated by the number of cases cited in the circuit and district courts in this petition, there is a history of reoccurrence in this area of the law. The need for review of the Tenth Circuit decision is not just to resolve the private dispute between the parties to this action, rather, it is to clearly set the standard for resolving disputes between employees and employers in the lower courts throughout the United States.

I. The decision of the Tenth Circuit is contrary to the language of the ADEA and is in conflict with decisions of other circuits which hold that naming a defendant as a respondent in the administrative charge is a condition precedent to filing a lawsuit.

Based on the facts in the instant case, under decisions of the U.S. Courts of Appeal for the Third, Fourth, Fifth, Sixth and Seventh Circuits, Whalen's charge of age discrimination would not be sufficient to meet the conditions precedent to commence an action in federal court against Unit Rig, Terex and MRL. Michelson v. Exxon Research and Engineering Company, 808 F.2d 1005 (3rd Cir. 1983); Mickel v. South Carolina State Employment Service, 377 F.2d 239 (4th Cir. 1967), cert. denied, 389 U.S. 877 (1967); Terrell v. U.S. Pipe & Foundry Co., 644 F.2d 1112 (5th Cir. 1981); Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136 (5th Cir. 1971); and Romain v. Kurek, 836 F.2d 241 (6th Cir. 1987). Also, see Perkins v. Silverstein, 939 F.2d 463, 471 (7th Cir. 1991), where the court held "that a party not named in the EEOC charge cannot be sued under Title VII."[1]

Federal courts in other circuits have consistently ruled that where the Plaintiff failed to name a party as the respondent in Plaintiff's EEOC charge and the party was

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[1] Under the EEOC Procedures the charge refers to the Age Official Complaint Form in which the charge is stated and the respondent is named. The charge is not part of the Age Complaint Intake Questionnaire. Id. at 470. The legal rules governing ADEA cases, including the administrative filing requirements, are virtually identical to those of the Title VII. The framework and procedure by which a plaintiff establishes his or her right to relief in a Title VII proceeding are applicable to ADEA claims, Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979). Courts often rely on the provisions of Title VII and cases construing it to address age discrimination claims. Aronsen v. Crown Zellerbach, 662 F.2d 584, (9th Cir. 1981) cert. denied, 459 U.S. 1200 (1983).

given no notice of the charge filed against it, and was given no opportunity to participate in an EEOC conciliation procedure, the party cannot be named in a subsequent civil suit. Jones v. Singer Career Systems, 584 F. Supp. 1253 (E.D. Ark. 1984); White v. N. Louisiana Legal Assistance Corporation, 468 F. Supp. 1347 (W.D. La. 1979); Evan v. Meadows Steel Products Inc., 579 F. Supp. 1391 (N.D. Ga. 1984); Seedman v. Alexanders, Inc., 683 F. Supp. 924 (S.D. N.Y. 1987); Smith v. Century Insurance, 674 F. Supp. 1459 (N.D. Ga. 1987). A party not named in an EEOC charge is not subject to suit in a private civil action for the same conduct complained of in the charge. Harris v. First National Bank of Hutchinson, Kansas, 680 F. Supp. 1489 (D. Kan. 1987); and Haag v. Board of Education, 655 F. Supp. 1267 (N.D. Ill. 1987).

The failure to name individual defendants as respondents is not a procedural technicality but a matter of substance because it fails to afford defendants the right to notice of a claim against them, Trevors v. Corning Glass Works, 76 F.R.D. (431 S.D. N.Y. 1977); and Quinn v. Bowmar Publishing Company, 445 F. Supp. 780 (D.C. Md. 1978). Also, see Gilmore v. Local 295, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 798 F. Supp. 1030 (S.D. N.Y. 1992), where the court ruled that absent any reference to a union in an employee's EEOC charge, the district court lacked jurisdiction over the employee's civil rights claims against the union.

Clearly, the decisions of a majority of courts hold that before a party may properly be sued under the ADEA, it must first be administratively charged. This requirement is to allow the EEOC to attempt to eliminate the alleged unlawful practice through informal methods of conciliation, conference and persuasion and to encourage the settlement of discrimination cases through voluntary compliance rather than litigation. EEOC v. Prudential Federal Savings & Loan Association, 763 F.2d 1166 (10th Cir. 1985), cert. denied,

474 U.S. 946 (1985); Marshall v. Sun Oil Co., 592 F.2d 563, 565 (10th Cir. 1979), cert. denied, 444 U.S. 826, 100 S. Ct. 49, 62 L.Ed.2d 33 (1979).

The opinion of the Tenth Circuit in Whalen, if let stand, will permit the filing of an action against a potential defendant who was not named as a respondent in the administrative charge, was not given notice of a valid charge or provided an opportunity for conciliation, which is in conflict with the decisions of other circuits. This is contrary to the intent of Congress and the clear language of the ADEA.

II. The decision of the Tenth Circuit is contrary to the language of the ADEA and is in conflict with decisions of other circuits which hold that asserting the claim sued upon in the administrative charge is a prerequisite to filing a lawsuit.

It is well settled that federal courts may only hear claims encompassed within the EEOC charge and like or related matters that might reasonably be expected to be subject to EEOC investigation growing out of the charge. Whalen could not pursue a claim against Petitioners for "failure to hire" because he did not make this allegation in his OHRC documents. An employee may not enlist the court's aid on claims never presented for agency [EEOC] consideration. Loe v. Heckler, 768 F.2d 409 (D.C. Cir. 1985); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Evans v. American Nurses Association, 657 F. Supp. 1277 (W.D. Mo. 1987). The scope of the subsequent judicial Complaint is limited to the scope of the EEOC or OHRC charge. In Babrocky v. Jewel Food Co. & Retail Meat Cutters, 773 F.2d 857 (7th Cir. 1985), the court noted that allowing a federal court complaint to encompass allegations outside the ambit of the predicate EEOC charge would

circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge.

Failure to properly identify the ADEA claim or to identify each individual ADEA claim in the notice to the EEOC has been held by numerous courts to be grounds for dismissing those complaints. See Steffan v. Meridian Life Insurance Company, 859 F.2d 539 (7th Cir. 1988), cert. denied, 109 S. Ct. 3191 (1989) (plaintiff barred from maintaining retaliatory discharge claim when the EEOC charge only mentioned age discrimination claim); Stalcop v. Kaiser Foundation Hospitals, 820 F.2d 1044 (9th Cir. 1987), cert. denied, 108 S. Ct. 504 (1987) (former employee's failure to use specific word "age" and "sex" in employment discrimination complaint filed with state agency precluded her action based on age and sex discrimination). In Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir. 1982), the court upheld the dismissal of the failure to rehire claim because the EEOC charge of illegal lay off did not encompass the allegation of failure to recall.

In Rush v. McDonald's Corporation, 966 F.2d 1104 (7th Cir. 1992), where a discharged black employee's claim filed with EEOC alleged that she had been discharged because of her race, the court held that the charge was insufficient to permit a lawsuit based upon sexual harassment; McGee v. Grand Rapids Press, 486 F. Supp. 584 (W.D. Mich. 1980) (where the EEOC charge was limited to allegations of race discrimination and layoff. The court held that the federal district court was without jurisdiction to consider claims of discrimination in hiring or promotion even where the same employer is involved in both actions.), affirmed 663 F.2d 1072 (6th Cir. 1981); and Looney v. Commercial Union Assurance Companies, (where the court held that the employee's notice of intent to sue only included a claim of discriminatory discharge the court dismissed the "retaliation" and "terms and conditions" claims included in

the Complaint filed in the civil suit for failure to comply with the notice requirement of Section 626(d)).[2]

In order to insure uniform application of the ADEA throughout the United States with respect to the requirement that a valid "charge" must be asserted in the administrative proceeding against named respondents prior to commencing an action in the federal courts, the conflict in the circuit courts should be settled by this court.

III. The decision of the Tenth Circuit is in conflict with decisions of other circuits and is contrary to the language of the ADEA and regulations mandated by Congress requiring that the parties have an opportunity to settle disputes through conciliation, conference and persuasion before commencing a civil action under the ADEA.

The ADEA provides that a civil action may be commenced by an individual only after a charge alleging unlawful discrimination has been filed with the EEOC and further states that "upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by

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[2] Whalen was represented by counsel throughout the administrative process and cannot now rightfully assert any claim for relief not raised in his attorney-drafted filings with the EEOC. See Keyse v. Cal-Tex Oil Corp., 590 F.2d 45 (2d Cir. 1978)(tolling of filing period "would be improper if appellant was represented by counsel . . . ."); Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195, 1200 n. 8 (5th Cir. 1975)("[T]he very purpose of consulting an attorney is to ascertain what legal redress arises out of a factual situation encompassing a supposed wrong"); Jacobson v. Pitman-Moore, Inc., 624 F. Supp. 937, 943 (D. Minn. 1978)("The result of negating plaintiff's ADEA claim because of the failing of an attorney is no doubt harsh. Still, defendant is not responsible for attorney Johnson's conduct").

informal methods of conciliation, conference, and persuasion." (emphasis added), 29 U.S.C. § 626(d). The Regulations require that the "charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)." 29 C.F.R. § 1626.6.

In Marshall v. Sun Oil Co. of Pa., 592 F.2d 563, 565 (10th Cir. 1979), the court states that "[t]he ADEA places primary emphasis on conciliation to resolve disputes," and further states as follows:

> The legislative history of the Act manifests the congressional intent that enforcement be effected wherever possible without resorting to formal litigation. The House Report states: It is intended that the responsibility for enforcement vested in the Secretary by section 7, be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense. (Emphasis in original).

See EEOC v. Prudential Federal Savings & Loan Association, 763 F.2d 1166 (10th Cir. 1985), cert. denied, 474 U.S. 946 (1985).

In Mickel v. South Carolina State Employment Service, 377 F.2d 239, 241, (4th Cir. 1967), cert. denied 389 U.S. 877 (1967) the court stated that "Congress has provided that persons aggrieved by unlawful practices should first attempt to have the Commission settle the matter in an atmosphere of secrecy without resorting to the extreme measure of bringing a civil action in the congested federal courts." The court further states that "it seems clear from the language of the statute [42 U.S.C. § 2000e-5(b)] that a civil action could be brought against the respondent named in the charge filed with the Commission only after conciliation efforts had failed, or, in any event, after opportunity had been

afforded the Commission to make such efforts." (Emphasis in original).

The Fifth Circuit held in Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136 (5th Cir. 1971), that "[p]otential litigants are absolutely required to take a step which affords them at least an opportunity to reach a more amicable conciliation out of court," and that "[t]he complainant must comply with the minimum jurisdictional requirements necessary to allow the opportunity for conciliation to mature." (Emphasis in original).

The court in Romain v. Kurek, 836 F.2d 241, 245 (6th Cir. 1987), stated that "[t]wo goals are advanced by requiring a plaintiff to name the Title VII defendant in the charge filed with the EEOC. First, the charge serves to notify the defendant of the discrimination claim alleged against him," and that "[b]y receiving notice of the claim, a defendant is able to preserve evidence that could be useful in his defense." The court further stated that "[b]y naming the charged party and bringing him before the EEOC, that person is able to participate in conciliation efforts directed at securing voluntary compliance with the Act," and finally, that "[c]onciliation is a primary goal of Title VII and provides an avenue for compliance without the resort to the expense and inconvenience of litigation." See also, Terrell v. U.S. Pipe & Foundry Co., 644 F.2d 1112, 1122 ("Only parties previously identified as respondents in charges filed with the EEOC are subject to subsequent liability under Title VII.").

In Babrocky v. Jewel Food Co. & Retail Meat Cutters, 773 F.2d 857, 863 the court stated that "[a] plaintiff must file a timely charge with the EEOC encompassing the acts complained of as a prerequisite to filing suit in a federal court." (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)). The court further noted that "[t]imely filing affords the EEOC 'an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party [is] permitted to file a lawsuit.'" Id. (quoting Alexander at 44).

In order to comply with the provisions of the Act requiring the elimination of "any alleged unlawful practice by informal methods of conciliation, conference, and persuasion," the courts must require that a party seeking relief under the ADEA file a charge embracing the claims included in his civil action complaint and that the persons named in the complaint be named in the charge filed with the EEOC. See Michelson v. Exxon Research and Engineering Company, 808 F.2d 1005 (3rd Cir. 1983); Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir. 1982) ("Illegal layoff - the charge which appeared in the EEOC notice - does not encompass an allegation of illegal failure to rehire"); Rush v. McDonald's Corporation, 966 F.2d 1104 (7th Cir. 1992).

IV. The decision of the Tenth Circuit is in conflict with decisions of other circuits which hold that applying for a job is a prerequisite to filing an age discrimination claim for failure to hire.

Whalen failed to make a case of age discrimination for failure to hire because he never applied for, or otherwise made known his desire for, the position. The decision of the Tenth Circuit on this issue is in conflict with decisions of the Third, Sixth and Eighth Circuit Courts of Appeals.

In an age discrimination case involving failure to hire, a Plaintiff must establish that he applied for the job. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973); Wanger v. G. A. Gray Company, 872 F.2d 142 (6th Cir. 1989); Fowle v. C&C Cola, et al., 868 F.2d 59 (3rd Cir. 1989); Chambers v. Wynne School District, 909 F.2d 1214 (8th Cir. 1990); Reilly v. Friedman's Express, Inc., 556 F. Supp. 618, 623 (M.D. Pa. 1983). Whalen never applied for any position with Unit Rig, Terex or MRL.

The ADEA does not require a plaintiff to submit a formal written application in every case, but it requires the plaintiff to manifest in some objective manner his desire to

be employed by defendant. In this case, Whalen did nothing.

In Wanger v. G. A. Gray Company, 872 F.2d 142 (6th Cir. 1989), the Court of Appeals held that a 51 year-old employee's failure to formally apply for an available position with his former employer after he had been terminated as part of a reduction in force precluded his Age Discrimination in Employment Act claim. The court stated, "With limited exceptions, one cannot establish that he was subject to an adverse hiring decision unless he makes his desire for the position known to the employer." See Chambers v. Wynne School District, 909 F.2d 1214 (8th Cir. 1990) (The Court of Appeals held that plaintiff did not establish a prima facie case of discrimination with regard to openings for which she never formally applied); Fowle v. C&C Cola, et al., 868 F.2d 59 (3rd Cir. 1989) (The court held that plaintiff's failure to apply for either of the open positions, or to otherwise indicate his desire for the position near the time they were filled, precluded him from complaining of the failure to hire.); and Reilly v. Friedman's Express, Inc., 556 F. Supp. 618, 623 (M.D. Pa. 1983) ("The requirement that an age discrimination plaintiff apply for the job is grounded in common sense. For if an application were not necessary, then nearly every decision to hire or promote would be subject to challenge.")

Whalen's failure to apply for a position with the company that purchased the assets of his former employer is in many circuits preclusive of his right to recover under the ADEA. The Third, Sixth and Eighth Circuits require that a person who complains of failure to hire must affirmatively apply for or make it known that he desires employment in the available position. The decision of the Tenth Circuit should be reviewed because it sets a standard for bringing a failure to hire suit which conflicts with other circuits.

CONCLUSION

The issues presented by this case are of great and recurring significance in the administration of claims brought pursuant to the Age Discrimination in Employment Act. The important nature of these issues has been recognized by numerous courts. The questions concerning administrative procedure and conditions precedent to filing which are involved here, along with the prejudicial effect of the decision below, if unreversed, make this case a particularly appropriate one for the exercise of this Court's discretionary jurisdiction.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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APPENDIX - A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOHN W. WHALEN,	)	
Plaintiff - Appellee,	)	
v	)	No. 91-5069
UNIT RIG, INC., a Delaware Corporation; TEREX CORPORATION, a Delaware Corporation; MRL ACQUISITION CORPORATION, a Delaware Corporation,	)	
Defendants - Appellants.	)	

APPEAL from the UNITED STATES DISTRICT COURT
for the NORTHERN DISTRICT OF OKLAHOMA
(D.C. 88-C-1667-B)

J. Patrick Cremin of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. (with Frank M. Hagedorn on the briefs) of Tulsa, Oklahoma, for Appellants.

J. Douglas Mann of Rosenstein, Fist & Ringold (with Eric P. Nelson on the briefs) of Tulsa, Oklahoma, for Appellee.

Before McKAY, Chief Judge, McWILLIAMS, Circuit Judge, and EISELE, District Judge. [1]

McKAY, Chief Judge.

[1]Honorable G. Thomas Eisele, Senior District Judge, United States District Court for the Eastern District of Arkansas, sitting by designation.

This age discrimination lawsuit arises from actions taken during a corporate acquisition. Plaintiff won a jury verdict and judgment for damages, attorney's fees, costs and expenses. Defendant companies appeal, arguing that plaintiff failed to prove his case and that the district court made various errors at trial. We affirm.

Unit Rig and Equipment Company ("URE"), after several years of financial troubles, was sold in 1988 to Terex Corporation ("Terex") with the assistance of MRL Acquisition Corporation ("MRL"). The newly acquired entity was named Unit Rig, Inc. ("URI"). As part of the acquisition process, all URE employees (approximately 500 people) were discharged on July 14, 1988, and all but forty-six were hired by URI on the following day without a formal job application process.

Plaintiff John Whalen was among the forty-six employees not hired by URI. He had been employed at URE since 1977 and had held the job of Controller for three years. He was sixty-three years old at the time of his discharge.

Frank Hill became president of URI when the acquisition was completed. He immediately merged the duties of Controller and Director of Finance, naming a Terex employee he knew to fill the new position of Vice President of Finance. This job merger lasted only two weeks, however, before the Vice President of Finance named another Terex employee as Controller. This new Controller was twenty-nine years old.

Shortly after Mr. Whalen heard that a new Controller had been hired, he filed documents with the Oklahoma Human Rights Commission ("OHRC") alleging that he had been the victim of age discrimination.[2] Mr. Whalen filed this lawsuit pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (1982) ("ADEA"), after the sixty-day

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[2]The OHRC is authorized by the Equal Employment Opportunity Commission ("EEOC") to process charges of age discrimination in employment.

deferral period mandated by ADEA had expired.[3]

Evidence was introduced at trial that a Terex vice president, Larry Skaff, had requested lists of URE employees in declining order of age and that these lists were delivered to Mr. Skaff and Mr. Hill at the time these two men made employment decisions regarding URI. One witness testified to hearing Mr. Hill describe his intent to hire a "young controller" during the acquisition process.

Defendants filed motions at various stages of litigation to challenge the sufficiency of the evidence to support a verdict of age discrimination. The companies now appeal from denial of these motions. Defendants also challenge the district court's decision to admit into evidence the lists of URE employees allegedly prepared at Mr. Skaff's request. Defendants further argue that the district court erred by allowing Mr. Whalen to dismiss his claim of willful age discrimination while the jury deliberated, and, finally, they raise various objections to the award of attorney's fees, costs and expenses.

As a preliminary matter, Mr. Whalen argues that the district court's denial of defendants' Notion for Summary Judgment is now moot and cannot be raised on appeal. He also argues that some issues raised in that motion were not preserved for appeal because they were not raised in defendants' Motion for Directed Verdict. This court has held that denial of a motion for summary judgment is not appealable. Boyles Galvanizing & Plating Co. v. Hartford Accident & Indem. Co., 372 F.2d 310, 312 (lOth Cir. 1967); cf. Grubb v. FDIC, 868 F.2d 1151, 1160 (lOth Cir. 1989) (issue of standing, first raised in summary judgment motion, could be addressed on appeal although summary judgment was denied).

Other circuit courts have recently adopted a rule that denial of summary judgment is not properly reviewable on an appeal from a final judgment entered after trial. Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990); Holley v.

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[3]URE was dismissed from the suit prior to trial by joint stipulation.

Northrop Worldwide Aircraft Serv., 835 F.2d 1375, 1377-78 (llth Cir. 1988); Locricchio v. Legal Services Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987); Senza-Gel Corp. v. Seiffhart, 803 F.2d 661, 669 (Fed. Cir. 1986); Glaros v. H. H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072 (1987). As the Federal Circuit explained, a denial of summary judgment is not a judgment, but "merely a judge's determination that genuine issues of material fact exist." Glaros, 797 F.2d at 1573 (citing Switzerland Cheese Ass'n. Inc. v. E. Horne's Mkt., Inc., 385 U.S. 23, 25 (1966) (denial of summary judgment "is strictly a pretrial order that decides only one thing--that the case should go to trial"). The Ninth Circuit has elaborated on the injustice-of "depriv[ing] a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial." Locricchio, 833 F.2d at 1359.[4]

We agree with the Eleventh Circuit that "[s]ummary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal." Holley, 835 F.2d at 1377-78. We now hold that even if summary judgment was erroneously denied, the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law ("JAMOL") and appellate review of those motions if they were denied.[5]

Defendants challenged the legal sufficiency of the documents Mr. Whalen filed with the OHRC in their Notion for Summary Judgment, claiming that the documents did not

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[4]We have found no case in which an appellate court overturned a jury verdict based on erroneous denial of summary judgment.

[5]This holding is consistent with the analysis of Grubb v. FDIC, 868 F.2d 1151 (10th Cir. 1989), where the issue of standing was examined on appeal from a final judgment after a full trial even though the moving party had been denied summary judgment on the matter and had not raised it in later motions for JAMOL. A challenge to standing, which is a jurisdictional issue, may be raised at any time. See Allen v. Wright, 468 U.S. 737, 750-51 (1984); Fed. R. Civ. P. 12(h)(3).

constitute a proper charge within statutory requirements. Summary judgment was denied. Defendants subsequently made an oral Motion for Directed Verdict and explicitly declined to revisit the issue of the OHRC documents.[6] This court has held that "[o]nly questions raised in a prior motion for directed verdict may be pursued in a motion for judgment notwithstanding the verdict. Dow Chem. Corp. v. Weevil-Cide Co., 897 F.2d 481, 486 (lOth Cir. 1990) (citation omitted). Defendants' decision not to address the issue in the Motion for Directed Verdict thus barred them from raising it in subsequent motions JAMOL. Because the issue was not properly raised below, we do not consider it on appeal. Farmers Ins. Co. v. Hubbard, 869 F.2d 565, 570 (lOth Cir. 1989). We now address other issues that were properly raised and preserved for appeal.

Defendants argue in their motions for directed verdict and judgment notwithstanding the verdict ("j.n.o.v.") that Mr. Whalen's case fails because he did not prove that he applied for a job with URI. Error in denying a motion j.n.o.v. will only be found if the evidence conclusively favors the moving party and is susceptible to no reasonable inferences that would sustain the non-moving party's position. Lucas v. Dover Corp., 857 F.2d 1397, 1400 (lOth Cir. 1988). In reviewing the district court's action, this court cannot assess credibility of witnesses or substitute its judgment for that of the jury. Id. The same standard of review applies to a motion for directed verdict. Zimmerman v. First Fed. Sav. & Loan Ass'n, 848 F.2d 1047, 1051 (lOth Cir. 1988) (citation omitted).

Employment discrimination law does not require that a plaintiff formally apply for the job in question. Rather, the law requires either that the employer be on specific notice

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[6]Defendants' counsel explained to the district court in his oral Motion for Directed Verdict that "I'm not moving for a directed verdict on the grounds that his [OHRC] complaint is inadequate. I've already been through that field with you before on a motion for summary judgment." (Appellants' Appendix at 580.)

that the plaintiff seeks employment or, where informal hiring procedures are used, that the plaintiff be in the group of people who might reasonably be interested in the particular job. Grant v. Bethlehem Steel, 635 F.2d 1007, 1017 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1133 (llth Cir. 1984).

After thorough review of the record, we conclude that the evidence here does not conclusively favor defendants. Mr. Hill testified that no formal employment application procedures were followed. In addition, Mr. Whalen testified that he informed Mr. Skaff when he left his job as Controller that he needed work. A jury could reasonably infer from this evidence that even without a formal job application, Terex officials were on specific notice that Mr. Whalen was interested in the job of Controller. The jury could also have found that as the recently discharged Controller and the last person to hold that job, Mr. Whalen would certainly have been in the group of people who might reasonably be interested in the job when defendants filled it within two weeks of his departure. The jurors apparently found Mr. Whalen credible, and we cannot substitute our judgment for theirs. We therefore affirm the district court's denial of defendants' motions for directed verdict and for j.n.o.v. based on this claim.

Defendants next contend that Mr. Whalen failed to prove that age was a determining factor in defendants' actions and that their proffered reasons for the actions were pretextual. The plaintiff in an ADEA case has the burden of establishing that age was a determining factor in the employer's actions. EEOC v. Sperry Corp., 852 F.2d 503, 507 (lOth Cir. 1988). After the plaintiff has established the prima facie case, the burden shifts to the defendant to show that a legitimate, nondiscriminatory reason motivated the challenged decision. Id. The plaintiff may then rebut the defendant's case by showing that the proffered justification is a pretext. Id. In considering defendants' challenge to the district court's

denial of the motions for directed verdict and for j.n.o.v., we examine the evidence and the district court's decision under the standard of review described earlier, noting that "[t]he plaintiff retains throughout the ultimate burden of proving that age was a determining factor in the challenged decision." Lucas v. Dover Corp., 857 F.2d at 1401.

Defendants argued at trial that Terex officials wanted Terex employees in the top financial positions at URI and that they originally planned to consolidate positions to eliminate the job of Controller. As described earlier, Mr. Whalen introduced evidence to challenge these claims of nondiscriminatory motivation. A witness for Mr. Whalen testified that Mr. Skaff requested employee lists in declining order of age at the time Mr. Skaff and Mr. Hill made employment decisions during the acquisition. The witness testified that he produced and delivered the lists to Mr. Skaff and Mr. Hill at this time. Undisputed evidence showed that a twenty-nine-year-old Terex employee was hired as Controller approximately two weeks after Mr. Whalen's discharge and the purported elimination of that job. Finally, a witness for Mr. Whalen testified to hearing Mr. Hill comment that he would hire a "young controller." All of this evidence is susceptible to the reasonable inference that Mr. Whalen's age was a determining factor in defendants' actions toward him and that defendants' proffered explanations were pretextual. The jury apparently made this inference, and we affirm the district court's decision to leave the verdict undisturbed.

Defendants argue that the district court erred by allowing into evidence the URE employee lists offered by Mr. Whalen. Defendants specifically claim that the lists were not relevant to issues at trial and that they caused prejudice to defendants and confused the jurors. We review the district court's decisions under Fed. R. Evid. 401 and 403 for abuse of discretion. United States v. Alexander, 849 F.2d 1293, 1301 (lOth Cir. 1988) (Fed. R. Evid. 401); Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (lOth Cir. 1990) (Fed. R. Evid. 403).

Mr. Whalen presented testimony that the lists of employees in declining order of age were prepared at the request of Mr. Skaff for Mr. Hill, were delivered to both men, and could have been consulted in employment decisions regarding Mr. Whalen. This testimony laid an adequate foundation for the district court's determination that the lists were relevant to the issue of age discrimination. We affirm the district court's determination of relevance.

Defendants argued at trial that the lists were not used in making employment decisions and that jurors would be confused and defendants prejudiced by admission of the lists into evidence. Resolving the factual dispute over whether the lists were used for employment decisions would properly be a matter for the jury. We hold that the district court did not abuse its discretion in finding that the lists would neither confuse the jury nor unfairly prejudice defendants on this matter.

Defendants argue that the district court erred when it allowed Mr. Whalen to dismiss his claim that defendants' age discrimination was willful. The dismissal came after the case had been submitted to the jury and after the parties were advised that the jury could not agree as to willfulness.

The decision to dismiss a cause of action under Fed. R. Civ. P. 41 is left to the discretion of the trial court and can be reversed only upon abuse of that discretion. LeCompte v. Mr. Chip Inc., 528 F.2d 601, 604 (5th Cir. 1976); Standard Indus. Inc. v. Mobil Oil Corp., 475 F.2d 220, 232 (lOth Cir.), cert. denied, 414 U.S. 829 (1973). When deciding whether to allow dismissal, the trial court should consider whether the non-moving party will suffer legal prejudice due to dismissal. LeCompte, 528 F.2d at 604.

In the case before us, the only prejudice defendants claim from the dismissal is loss of bargaining power with Mr. Whalen regarding other claims in the lawsuit. Even if Mr. Whalen did gain some tactical advantage from dismissing the claim late in the proceedings, the detriment arguably resulting for defendants would not have reached the level of

legal prejudice that the district court is required to consider in granting the motion to dismiss a claim. LeCompte, 528 F.2d at 604 (gain in tactical advantage not a bar to dismissal) (citation omitted). We hold that allowing Mr. Whalen to dismiss his willfulness claim at this stage was not an abuse of the district court's discretion.

Defendants appeal from denial of their Motion for New Trial, claiming that the verdict was against the law and the weight of the evidence.[7] We review the district court's decision for abuse of discretion. Richardson v. City of Albuquerque, 857 F.2d 727, 730 (lOth Cir. 1988). After thorough review of the record and for reasons cited earlier in this opinion, we conclude that the verdict was neither against the law nor against the weight of the evidence. Finding no abuse of discretion, we affirm the district court's denial of the motion.

Defendants contend that the district court erred in its award of attorney's fees, costs and expenses. This is a matter clearly within the district court's discretion. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Spulak v. K Mart Corp., 894 F.2d 1150, 1159-60 (lOth Cir. 1990).

Defendants first object to Mr. Whalen's recovering attorney's fees incurred during the administrative process preceding litigation. When this court addressed a similar issue under Title VII, our analysis focused on whether the administrative process was a prerequisite to court action. Manders v. Oklahoma ex rel. Dept. of Mental Health, 875 F.2d 263, 266-67 (lOth Cir. 1989) (citing New York Gaslight Club. Inc. v. Carey, 447 U.S. 54 (1980)). We now hold that because ADEA requires private plaintiffs to seek an administrative remedy prior to bringing suit, a fee award under ADEA may properly include fees for time spent on the administrative proceedings. See Reichman v. Bonsignore. Brignati & Mazzotta P.C., 818 F.2d 278, 282-83 (2d Cir.

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[7]Defendants also reiterate their claim regarding admissibility of the employee lists. Having affirmed the district court's decision on this matter, we do not consider the claim in the Motion for New Trial.

1987) (congressional intent supports fee award for administrative proceedings under ADEA). Thus we affirm the district court's award in this regard.

Defendants also challenge the award of attorney's fees for time spent pursuing actions against URE that settled out of court. The Supreme Court has instructed that a fee award should be determined by examining "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Hensley, 461 U.S. at 435; see also Ramos v. Lamm, 713 F.2d 546, 556 (lOth Cir. 1983). "Reasonably expended" hours would not include time spent on claims "unrelated" to those on which the plaintiff prevails. Hensley at 434-35; Ramos at 556. The Hensley court held that a plaintiff cannot receive fees for time spent on "distinctly different claims for relief that are based on different facts and legal theories" and on which the plaintiff does not succeed. Hensley at 434-35. In the current case, Mr. Whalen's claims against all original defendants involved the same facts and legal theories. Because of the corporate acquisition in progress when Mr. Whalen was discharged, his claim against URE was substantially interrelated with his successful claims against the other defendants. We find no abuse of discretion in the district court's award of attorney fees for time spent on claims against URE that were settled before trial.

Defendants raise a similar objection to the award of attorney's fees for time spent litigating the willfulness claim which was dismissed on Mr. Whalen's motion. This argument falls squarely within the Hensley rationale as described above. The willfulness claim was based on the same core of facts and legal theories as Mr. Whalen's other claims. This court has allowed a fully compensatory fee where claims for relief were based on a common core of facts and the plaintiff obtained excellent results even though the plaintiff did not prevail on every contention. Spulak, 894 F.2d at 1160 (citing Hensley, 461 U.S. at 435). In light of Hensley and Spulak, we find no abuse of discretion in the

district court's award of attorney's fees for time spent pursuing the claim that discrimination was willful.

Defendants also challenge the award of attorney's fees for time spent working with a statistical expert who did not testify at trial. Under Hensley and Ramos, the question for the district court was whether such time was reasonably expended in pursuit of Mr. Whalen's case. We find no abuse of discretion in the district court's finding that time spent researching a statistical argument in the instant case was reasonable, and we affirm the award of attorney's fees in this regard.

Defendants object, finally, to an award covering expenses for photocopying and computer research, complaining that the expenses are not adequately identified. Defendants have not directly attacked the affidavits of Mr. Whalen's counsel certifying the reasonableness and necessity of the charges. Neither have defendants cited legal authority for requiring more specificity in identifying expenses. We find defendants' bald assertion that expenses were inadequately identified to be unpersuasive. See Shorter v. Valley Bank & Trust Co., 678 F. Supp. 714, 727 (N.D. Ill. 1988) (court declined to require that photocopying invoices identify each document copied where all invoices were identified to lawsuit and total amount was not excessive). We hold that the district court did not abuse its discretion in awarding these expenses.

For the foregoing reasons, we AFFIRM the district court decisions.

APPENDIX - B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOHN W. WHALEN, Plaintiff - Appellee, v. UNIT RIG, INC., a Delaware Corporation; TEREX CORPORATION, a Delaware Corporation; MRL ACQUISITION CORPORATION, a Delaware Corporation, Defendants - Appellants.	)	No. 91-5069

ORDER ON PETITION FOR REHEARING

Before McKAY, Chief Judge, McWILLIAMS, Circuit Judge, and EISELE, District Judge.[8]

On Petition for Rehearing, Appellants properly point

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[8]Honorable G. Thomas Eisele, Senior District Judge, United States District Court for the Eastern District of Arkansas, sitting by designation.

out that it in fact preserved the issue of the adequacy of plaintiffs' filing with the Oklahoma Human Rights Commission (OHRC). Thus, this Court erroneously refused to consider the issue.

The Court has reviewed this issue as briefed, together with the record and the trial court's order of April 17, 1990, denying defendants' Motion for Summary Judgment on that issue. We conclude that the trial court was correct in its analysis and concluion contained in its Order on pages one through seven. We therefore conclude that our initial affirmance Of the Judgment was corect. As herein modified, our opinion and order is affirmed on rehearing.

Entered for the Court

Monroe G. McKay
Chief Judge

APPENDIX - C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN W. WHALEN	)	
	)	
Plaintiff,	)	
	)	
vs.	)	88-C-1667-B
	)	
URE CO., a Texas corporation, formerly UNIT RIG AND EQUIPMENT COMPANY, a Texas corporation; UNIT RIG, INC., a Delaware corporation; MRL ACQUISITION CORP., a Delaware corporation; and TEREX CORPORATION, a Delaware corporation,	)	
	)	
Defendants.	)	

ORDER

This matter comes on for consideration upon the Motion for Summary Judgment filed by the Defendants Unit Rig, Inc. (URI), MRL Acquisition Corp.(MRL), and Terex Corporation (TEREX).

This is an age discrimination suit brought by .the Plaintiff, John W. Whalen, for alleged violations of the Age Discrimination Act of 1967, as amended, 29 U.S.C. §§621-34(ADEA), based upon a "refusal to hire" charge. Plaintiff's previous employer, URE CO., formerly Unit Rig and

Equipment Company (URE), has been dismissed as a Defendant herein by joint stipulation. Plaintiff had alleged he was wrongfully discharged by URE on July 14, 1988.

Plaintiff was employed by URE from June 8, 1977, until July 14, 1988. At the time of his discharge Plaintiff was 63 years of age. Plaintiff had been Controller of URE since July, 1985.

During the 1980s URE experienced difficulties sufficient to require layoffs and cause the company to seek Chapter 11 Bankruptcy relief (1985). From a peak of 2000 employees, URE had reduced to less than 500. A 10% wage decrease was invoked in 1988 as an alternative to further reduction of the work force.

During 1987-88 URE's management sought prospective purchasers including URE's management personnel (among which was Plaintiff). Defendant Terex became interested in URE and ultimately acquired the assets of URE (with the assistance of Defendant MRL), naming the new entity Unit Rig, Inc. (URI, a defendant herein).

To effect the acquisition, all of the employees of URE were discharged on July 14, 1988, and all but 46 were hired by the new company, URI, on July 15. Plaintiff was not among the rehired[9], hence the "refusal to hire" charge.

Two significant employee lists were prepared before the acquisition, a Reduction in Force list (RIF list) and a Paymaster list. Although entitled "paymaster by service date", the Paymaster list was organized by age, listing the employees by their ages, the oldest being at the top of the list[10]. The RIF list was organized by departments, although the ages of the employees were shown thereon. 44 employees were on the RIF list. The Paymaster (Age) list contained the names of 155 employees.

It is evident that Plaintiff either prepared the RIF list

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[9]Plaintiff, however, served, for a specified fee, as a consultant to URI for approximately 60 days immediately after July 15, 1988.

[10]In fact, the Paymaster list title had been corrected by ink to read "paymaster by age date".

or had significant input in its preparation. It is disputed why the RIF list was prepared[11], and even when it was prepare[12]. While the RIF list, as originally prepared contained 44 names (one name, J. Kotekar, was later stricken), three more names, including Plaintiff's[13], were penciled additions. Of this total of 46 names, 28 appeared on the Paymaster-Age list.[14] All but two, Thomas Laven, age 63 (noted as "retired") and P. Laucher, age 39, were not hired by the new company. Plaintiff was in the group not hired by the new company, URI.

Defendants' Motion for Summary Judgment relates to two broad issues, either urged by Defendants as dispositive of this matter. The first issue is: Plaintiff has failed, procedurally, to take the requisite steps in his alleged failure to file a proper and timely "charge" with or before the Equal Employment Opportunity Commission (EEOC) or its state level correlative where applicable, in this case the Oklahoma Human Rights Commission (OHRC).

Defendants admit Plaintiff filed, on October 20, 1989, "Intake Questionnaires" for each of the Defendant companies but allege Plaintiff misstated his complaint therein as to the present Defendants due to his allegation he was laid-off or discharged because of his age. Defendants allege this could only be true, if at all, in relation to Plaintiff's former employer, URE; that the cause of action pled in the complaint alleges "failure to hire"; therefore no EEOC or

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[11]There is conflicting evidence whether it was prepared only in connection with possible acquisitions, or was prepared in anticipation of a reduction in force regardless of acquisition by another entity.

[12]It is undisputed one RIF list was prepared on April 18, 1988; however, Defendants' undisputed fact No. 24 recites the URE's top management, including Plaintiff, compiled a list on July 11, 1988, consisting of 44 employees who should be discharged under a reduction of force. It does not appear there were two different RIF lists.

[13]Walter Jackson, age 59, Vice-President of Finance, and K.L. Zilm, age 56, Vice-President of Human Resources.

[14]The other 18 employees being NE (non-exempt) employees and not listed on the Paymaster-Age list).

OHRC charge was ever properly made as to the present Defendants. Defendants further admit Plaintiff filed, on October 20, an Age Complaint Affidavit,[15] which advised Plaintiff intended to file suit after the required wait of 60 days. 29 U.S.C.§626(d). Plaintiff also filed with OHRC on that date a "layoff" statement.

On October 31, 1988, Plaintiff's attorney, Eric P. Nelson, wrote Floyd Wingo of the OHRC confirming an earlier telephone conversation that OHRC would only pursue the claim as against URE; that such decision was made at the sole discretion of OHRC and was neither requested nor agreed to by Plaintiff. Plaintiff filed the instant action on December 30, 1988.

The following appears in C. Richey, Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts (Federal Judicial Center Jan. 1988 ed.)

> Although there are no formal charge-filing procedures, an employee may not commence suit until he/she has filed a charge alleging unlawful discrimination with the EEOC. 29 U.S.C.§626(d), as amended in 1978. The statute's use of the word "charge" is intended as a liberalization of the "notification of intent to sue" mandated by the original ADEA. The "charge" requirement should be satisfied by the filing of a written statement identifying the potential defendant and generally describing the allegedly discriminatory action. H.R. Rep. No. 950, 95th Cong., 2d Sess. 12 (1978) (conference report). The basic purpose of the charge is to provide the EEOC with sufficient information so that it may notify prospective defendants through informal methods of conciliation.

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[15] In the affidavit Plaintiff names the present Defendants URI, MRL and TEREX as acting in concert with URE to unlawfully terminate his employment on the basis of his age.

The issue of whether a charge meets the statutory requirement is not unique. See, e.g. Michelson v. Exxon Research & Eng'g Co., 808 F.2d 1005 (3d Cir. 1987), holding that a charge must at least be written. See, also Greene v. Whirlpool Corp., 708 F.2d, 128 (4th Cir. 1983), cert. den. 464 U.S. 1042 (1984), holding that an employee's oral notice is insufficient. The legislative history of ADEA states the charge requirement is not jurisdictional.[16] Id. It therefore is subject to equitable tolling, where factually applicable. Nielsen v. Western Elec. Co., 603 F.2d 741 (8th Cir. 1979). ADEA, being remedial in nature, should be liberally construed. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765 (1979).

Defendants heavily rely upon the proposition that Plaintiff's filings with the OHRC spoke to being discharged or "laid-off" because of age discrimination, rather than the present Complaint language of "failure to hire". Based upon the limited information provided in the Age Complaint Intake Questionnaires, the OHRC apparently chose to, on Plaintiff's behalf, pursue the matter only against URE. Had the OHRC[17] had before it the record now before the Court, it would or could have understood that Plaintiff's grievance was not a simple discharge-because-of-age case; it was more complex because of the Defendants' concerted arrangement to fire all the URE employees and hire back only those of their choosing. If this arrangement contained within it age discrimination it could, the Court concludes, be actionable under ADEA if adequately proven to the fact finder.

The Court concludes, under the unusual

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[16]One decision, however, has held the court is without jurisdiction when a charge has not been filed. Bengochea v. Norcross, inc., 464 F. Supp. 709 (E.D. Pa. 1979).

[17]The Court concludes the OHRC could have perceived the inherent complexity of Plaintiff's complaint by statements in the Age Complainant Affidavit that "these entities acted in concert to unlawfully terminate my employment on the basis of my age."

circumstances of the acquisition of Plaintiff's former employer, URE[18], that the filings made by Plaintiff with the OHRC were sufficient to constitute a "charge" within the meaning of 29 U.S.C. §626(d). The Court further concludes that the agency had sufficient information, had it so chosen, to notify the Defendants of Plaintiff's complaint. Plaintiff's Age Complaint Affidavit, plus his attorney's letter of October 31, 1988, made it more than clear that he intended to pursue his claims against these entities notwithstanding that OHRC was only pursuing the claim against URE. Therefore, Defendants' Motion for Summary Judgment, as to the improper or untimely filing of a charge with EEOC or its state counter-part as a prerequisite to filing the instant action should be and the same is hereby DENIED.

The Court next considers Defendants' second issue, a contention they are, under the undisputed facts herein, entitled to summary judgment as a matter of law because no prima facie age discrimination has been shown.

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[18]Defendants' tongue-in-cheek proposition that Plaintiff never applied for a job with the new company is disingenuous in light of the deposition testimony of the new entity's new president, Frank Hill, as follows:

"Q. So, how did these folks, for example, the chief accountant that we just talked about, how did Mr. Campbell know that he had a job on July 15?

A. (by Frank Hill) They were told that if you weren't getting severance pay you would report to work, as near as I can determine what was told to them.

Q. So, if you're not -- unless you're told to the contrary, you ought to be here the next day ready to work; right? Pardon me?

A. Yes, that's correct.

Q. So there was no need for anybody to apply for employment if they wanted employment with URI, was there?

A. No need. No need, right."

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The Court must consider the significance vel non of the RIF list and the Paymaster-Age list, and what significant inferences a fact finder might realize therefrom. Of the top eight names (oldest) on the Paymaster-Age list, six were not re-hired (lowered to five when Laven, age 63, was retained under a designation of "retired"). Also, from the top 1/3rd of the Paymaster-Age list, 12 were fired while only 5 were fired from the bottom 1/3rd (youngest) of the list.

The Court concludes the RIF list use and the Paymaster-Age list use, although not essentially disputed, are capable of conflicting inferences by a fact finder vis-a-vis indicia of age discrimination. The Court is not unaware of the testimony of new URI president Frank Hill that he,

solely, made the determination that Plaintiff's job be eliminated, and that the decision was made without regard to Plaintiff's capabilities or competence. Yet the testimony[19] reveals a conflict whether Frank Hill asked for the Paymaster-Age list and whether Frank Hill said he was going to get a new controller, "a young one"[20]. It is undisputed that William Schein, a 29 year old, with no previous experience as a Controller, was hired within several weeks of Plaintiff's departure to fill Plaintiff's previous position as Controller. Defendants contend John Liechty was hired to replace Plaintiff but that, in less than three weeks, it was determined Liechty needed help handling the financial affairs of URI; thus Schein was hired. The Court concludes these events and their contrasting versions, demonstrate factual disputes, or at least possible conflicting inferences from undisputed facts, to preclude summary judgment. Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979).

The Court is aware that age discrimination cases often rely on an indirect proof scheme as established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981). In Cockrell v. Boise Cascade Co., 781 F.2d 173 (10th Cir. 1986), the Court noted the fourth prima facie element[21] had been modified by allowing a Plaintiff to show through circumstantial evidence that he/she was treated less favorably than younger employees during the reduction-in-force. (citing Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988).

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[19]Deposition of Walter E. Jackson, p. 93, attachment to Plaintiff's brief.

[20]Deposition of Walter E. Jackson, p. 209, attached to Plaintiff's brief.

[21]Requiring the Plaintiff to produce evidence, circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

This Court, in an earlier case[22], entered judgment n.o.v. in favor of an employer-defendant. While the case was not a failure-to-hire case, it has similarities to the present case.[23] On appeal, the Court of Appeals held that the employees-plaintiffs failed to establish that the employer's reason for terminating them was a pretext for age discrimination, as the testimony of the other employees indicated that the employer was attempting to retain those employees with the broadest range of skills and abilities to shepherd the company through very difficult economic times. Lucas v. Dover Corp., Norris Div., supra. The present posture of the instant case distinguishes it from Lucas. Today, the Court is determining whether a genuine dispute exists as to any material fact. The Court concludes the Defendants' Motion for Summary Judgment, on the issue that no genuine facts of a material nature exist and Defendants are entitled to judgment as a matter of law, should be and the same is hereby DENIED. As in Lucas v. Dover Corp., Norris Div., supra, the Court will reexamine the matter at the time of trial.

IT IS SO ORDERED this ___ day of _____, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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[22]Lucas v. dover corp., Norris Div., 857 F.2d 1397 (10th Cir. 1988).

[23]Of the 18 supervisory employees terminated, 11 were under the age of 40 while only seven were over 40.

APPENDIX - D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN W. WHALEN,	)
Plaintiff,	)
vs.	)Case No. 88-C-1667-B
URE CO., a Texas corporation, formerly UNIT RIG AND EQUIPMENT COMPANY, a Texas corporation; UNIT RIG INC., a Delaware corporation; MRL ACQUISITION CORP., a Delaware corporation; and TEREX CORPORATION, a Delaware corporation,	)
Defendants.	)

JUDGMENT

In accordanee with the jury verdict rendered on December 12, 1990, Judgment is hereby entered in favor of Plaintiff, John W. Whalen and against the Defendants, UNIT RIG INC., MRL ACQUISITION CORP., and TEREX CORPORATION, in the amount of $106,766.95, plus post-judgment interest at the rate of 7.28% (28 U.S.C. § 1961) from December 13, 1990, until said Judgment is paid. Costs are assessed against the Defendants, if timely applied for under Local Rule 6. Attorney fees, if appropriate, may be requested if timely applied for under Local Rule 6.

DATED this 13th day of December, 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
FEB 12 1993
OFFICE OF THE CLERK

No. 92-1236

In The

Supreme Court of the United States

October Term, 1992

UNIT RIG, INC., TEREX CORPORATION and MRL ACQUISITION CORPORATION,

Petitioners,

v.

JOHN W. WHALEN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit erred in finding that the plaintiff's charge of unlawful employment discrimination, consisting of the Age Intake Questionnaire, Age Complaint Affidavit and counsel's letter to the OHRC dated October 31, 1988, constituted a proper charge under 29 U.S.C. § 626(d).

2. Whether the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit erred in holding that the evidence presented at trial was sufficient to support the jury's verdict. Specifically, whether Whalen met his burden of establishing as an element of his prima facie case of discrimination under the Age Discrimination in Employment Act that he applied for employment or otherwise made his interest in employment known to the defendants.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent, John W. Whalen ("Whalen"), respectfully requests that this Honorable Court deny the Petitioners' request for a writ of certiorari. The Respondent submits that the result in this case is consistent with previous decisions of this Court, of the United States Court of Appeals for the Tenth Circuit and of other circuit courts of appeal.

The questions presented by the Petitioners concern issues of fact and the lower courts' interpretation of administrative procedures under the Age Discrimination in Employment Act ("ADEA"). These issues were decided by the trial court and affirmed by the Tenth Circuit solely on the basis of the unique facts and circumstances present in this case. Accordingly, the decision is of no real significance in the administration of future ADEA claims and has little or no precedential value. For these reasons, the Respondent respectfully asks that the Petitioners' request for a writ of certiorari be denied.

OPINIONS BELOW

See Petitioners' Appendix A-1 to A-23 and Respondent's Appendix A-1 to A-6.

JURISDICTIONAL STATEMENT

The Respondent accepts the Petitioners' jurisdictional statement.

STATUTORY AND REGULATORY PROVISIONS

The Petitioners' statement of the statutes and regulations governing determination of the issues raised in their request for certiorari incorrectly includes a citation to 42 U.S.C.A. § 2000e-5. Section 2000e-5 contains enforcement provisions applicable to charges filed under Title VII of the Civil Rights Act of 1964. While it is true that courts have applied case law developed under Title VII to analogous situations arising in employment discrimination suits brought under the ADEA,[1] where clearly different procedures exist, there is no justification for reliance on Title VII authority. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Due to the significant differences in the remedial and procedural provisions of the two statutes, the Court in *Lorillard* refused to apply Title VII authority to procedural issues arising under the ADEA.

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[1] Cases cited by the Petitioners (Petitioners' brief, p. 12, n. 1) approved of the application of Title VII authority *only* where its provisions have similar or identical counterparts within the ADEA. *See, e.g., Aronsen v. Crown Zellerbach*, 662 F.2d 584, 588-89 (9th Cir. 1981) (filing deadlines in deferral states are virtually identical under ADEA and Title VII regulations and, therefore, Title VII authorities may be used as "interpretive aids" in ADEA cases); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-15 (1st Cir. 1979) (methods and burden of proof suggested for Title VII cases in *McDonnell Douglas* may be applied in ADEA cases given the important similarities in the aims and substantive provisions between the two statutes). Even if resort to Title VII case law were appropriate for the interpretation of ADEA administrative procedures, there is *no* authority to support direct application of the Title VII statutes to cases brought under the ADEA.

As discussed in this response, and as noted by this Court in *Lorillard*, the ADEA's administrative enforcement and charge filing procedures are significantly different from their Title VII counterparts. *See also E.E.O.C. v. Wackenhut Corp.*, 939 F.2d 241, 243-44 (5th Cir. 1991) (refusing to apply Title VII authority to proceedings under the ADEA because the two laws "diverge substantially in their enforcement provisions.") Accordingly, the statutes, regulations and case law controlling the administration and enforcement of Title VII has no place in the analysis of the issues raised in the Petitioners' Brief.

STATEMENT OF THE CASE

An accurate statement of the case, based upon the evidence presented at trial, is contained in the opinion of the Tenth Circuit. Petitioners' Appendix at A-2 to A-3. In its present posture, this case involves a *factual* dispute concerning (1) the sufficiency of the evidence supporting Whalen's prima facie case of discrimination and (2) the sufficiency of the charge Whalen filled with the EEOC alleging unlawful employment discrimination on the basis of age.

The Petitioners' Statement of the Case mischaracterizes the nature and the scope of the appellate decision in this case. The Tenth Circuit did *not* hold, as suggested by the Petitioners, that a valid charge of discrimination under the ADEA need not name the respondent, describe the nature of the discriminatory act or be reasonably related to the causes of action ultimately raised in a federal court complaint. To the contrary, the Tenth Circuit properly held these requirements to be valid, but

affirmed under the specific facts of the case, the trial court's determination that Whalen had satisfied each of the ADEA's procedural prerequisites to the filing of a lawsuit.

The Petitioners further suggest that the Tenth Circuit's decision permits a plaintiff to maintain an action for "failure to hire" under the ADEA even if the plaintiff had neither applied for employment nor made his interest in employment known to the prospective employer. This simply is not true. The court of appeals *and* the district court recognized this as an essential element of Whalen's prima facie case. The Tenth Circuit merely held that sufficient evidence was presented to support the jury's determination that Whalen had made his interest in the job specifically known to the defendants.

The Respondent must also direct the Court's attention to three material misstatements contained in Petitioner's summary of facts. First, the Petitioner incorrectly states that this case arose from Whalen's termination from employment by Unit Rig and Equipment Company ("URE") prior to the Petitioners' acquisition of URE's assets. As the court of appeals correctly noted and as discussed at length by the district court, this case "was not a simple discharge-because-of-age case; it was more complex because of the [Petitioners'] concerted arrangement to fire all the URE employees and hire back only those of their choosing." *Order Denying Defendants' Motion for Summary Judgment,* Petitioners' Appendix at A-18.

Petitioners' second misstatement arises from their assertion that Whalen never "inform[ed] anyone with Unit Rig or Terex that he had an interest in the controller

position or other permanent employment with Unit Rig."[2] The court of appeals held that ample evidence was submitted to enable the jury to conclude, as they evidently did, that "even without a formal job application, Terex officials were on specific notice that Mr. Whalen was interested in the job of Controller." *Opinion of the United States Court of Appeals for the Tenth Circuit,* Petitioners' Appendix at A-6.

Finally, the Petitioners' reference to the filing of Whalen's action in the district court "prior to the completion of the administrative procedures"[3] while technically accurate, is misleading in that it implies that either exhaustion of administrative remedies or receipt of a notice of right to sue is required under the ADEA. The only significance of the December 30, 1988 filing date is that it demonstrates that Whalen complied with the 60-day deferral period required under 29 U.S.C. Section 626(d).

SUMMARY OF REASONS FOR DENYING PETITIONERS' REQUEST

The Petitioners' request for a writ of certiorari should be denied because the Tenth Circuit, in affirming the judgment of the district court, correctly and consistently applied the law and regulations governing administrative filing requirements under the ADEA to the findings of fact made in the district court. Both the district court and the court of appeals concluded that: (1) Whalen filed a

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[2] *See* Petitioners' Brief, p. 8.

[3] *Id.*

proper and timely charge of unlawful discrimination against each of the Petitioners; (2) the cause of action alleged in Whalen's complaint was like or reasonably related to the factual allegations contained in his EEOC charge; (3) Whalen made his interest in the position of Controller specifically known to the Petitioners; and (4) the EEOC had sufficient information before it as a result of Whalen's charge that it could have notified each of the Petitioners and undertaken efforts toward conciliation.

Despite the Petitioners protests to the contrary and their attempt to graft the administrative procedures of Title VII to this case, all that is required of a plaintiff under the ADEA is that he file a charge in writing identifying the prospective respondents and generally describing the acts alleged to be discriminatory. 29 C.F.R. § 1626.8(b). *See Foster v. National Bank*, 857 F.2d 1058, 1060 (5th Cir. 1988). The plaintiff must then wait 60 days to file a complaint in district court. Whalen clearly met this burden.

The grant of a writ of certiorari in this case will neither quell a flood of litigation nor resolve an existing conflict among the circuits. Due to the unique facts present in this case, its outcome will have little or no effect upon employment discrimination law. In short, this case is of great importance only to the parties themselves. The Respondent respectfully suggests that the best way for this Court to protect the time and resources of an "overwhelmed and understaffed judiciary"[4] is to deny Petitioners' request for writ of certiorari.

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[4] Petitioners' Brief, p. 11.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The United States Court of Appeals for the Tenth Circuit properly affirmed the trial court's analysis of the administrative filing requirements under the ADEA and its conclusion that Whalen's charge of discrimination satisfied all procedural prerequisites to suit.

Under the ADEA, unlike Title VII, a plaintiff need only file a timely charge with the EEOC alleging unlawful discrimination and wait a period of 60 days to commence his civil action. 29 U.S.C. § 626(d). In order to constitute a valid charge, it is only necessary that the charge be in writing, name the prospective respondent(s) and generally allege the discriminatory acts. 29 C.F.R. § 1626.6. *Compare* 42 U.S.C. § 2000e-5(b) to (e) (requiring, *inter alia*, that a valid charge under Title VII be under oath and contain such information and be in such a form as the Commission requires).

The district court's analysis of the administrative procedures under the ADEA correctly noted that there are no formal charge filing requirements, but that the requirement of a "charge" is satisfied by the filing of a written statement identifying the potential defendant and generally describing the allegedly discriminatory action. *Order Denying Defendants' Motion for Summary Judgment*, Petitioners' Appendix at A-17. The Tenth Circuit specifically adopted the district court's analysis and conclusion on this issue. *Order on Petition for Rehearing*, Petitioners' Appendix at A-13.

A. Whalen's charge of discrimination identified each of the defendants and generally described the actions which he alleged constituted unlawful discrimination on the basis of age.

The Petitioners argue that Whalen's charge was insufficient on two grounds. First, the Petitioners claim that Whalen did not name them as respondents in his filings with the OHRC. The Petitioners next argue that the charge did not allege "failure to hire" as set forth in his complaint. Both the court of appeals and the district court, according to the Petitioners, disregarded the alleged insufficiency of Whalen's charge resulting in a conflict among the circuits over the issue of whether a valid charge of discrimination is a prerequisite to litigation in federal court.

As reflected in the record, both lower courts *did* consider the Petitioner's arguments concerning the sufficiency of Whalen's charge and rejected each and every one. The trial court made the following findings with regard to the sufficiency of Whalen's charge of discrimination filed with the OHRC:

> The Court concludes, under the unusual circumstances of the acquisition of Plaintiff's former employer, URE, that the filings made by Plaintiff with the OHRC were sufficient to constitute a "charge" within the meaning of 29 U.S.C. Section 626(d). The Court further concludes that the agency had sufficient information, had it so chosen, to notify the Defendants of Plaintiff's complaint. Plaintiff's Age Complaint Affidavit, plus his attorney's letter of October 31, 1988, made it more than clear that he intended to pursue his claims against these entities notwithstanding

> that OHRC was only pursuing the claim against URE.

Order Denying Defendants' Motion for Summary Judgment, Petitioners' Appendix at A-19 (footnote omitted). The Tenth Circuit adopted the analysis and conclusions reached by the trial court. *Order on Petition for Rehearing,* Petitioners' Appendix at A-13.

Unlike Title VII, which requires that a "charge" be made under oath and in the form specified by the EEOC,[5] the ADEA requires only that the charge be in writing, name the prospective respondents and generally describe the discriminatory conduct.[6] The Petitioners ask this Court to hold that a "charge" under the ADEA cannot be made without the filing of an Age Official Complaint Form. There is *no* authority for this position in a case brought under the ADEA. The information Whalen provided to the EEOC in the Age Complaint Intake Questionnaires, the Age Complaint Affidavit and in counsel's letter of October 31, 1988, was more than sufficient to indicate his intention to activate the EEOC's enforcement machinery. These writings, filed within the time permitted under 29 U.S.C. § 626(d), clearly identified the Petitioners as respondents and generally described the actions which Whalen alleged to be discriminatory. Nothing more is required. *Clark v. Coats & Clark, Inc.* 865 F.2d 1237, 1240-41 (11th Cir. 1989); *Steffen v. Meridian Life Insurance Co.* 859 F.2d 534, 542-44 (7th Cir. 1988).

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[5] 42 U.S.C. § 2000(e)-5(b).

[6] 29 C.F.R. § 1626.6 This section, in stark contrast to the rigid requirements of Title VII, also permits the receipt of verbal charges in person or by telephone if the charge is ultimately reduced to writing.

The Petitioners also challenge the sufficiency of Whalen's charge since it did not contain the phrase "failure to hire". However, as the Petitioners admit,[7] a plaintiff may properly bring an action to recover on all claims which are included in the administrative charge *and* claims which are like or reasonably related to allegations contained in the charge. Whether a cause of action contained in the complaint is "like or reasonably related to" allegations contained in the charge depends upon the scope of the investigation which that charge may reasonably trigger on the part of the EEOC. "An administrative charge is not a blueprint for the litigation to follow . . . Rather, the critical question is whether the claims set forth in the civil complaint come within the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination'." *Powers v. Grinnell Corp.* 915 F.2d 34, 38 (1st Cir. 1990) (citations omitted). *See also Tamimi v. Howard Johnson Co.*, 807 F.2d 1550 (11th Cir. 1987); *Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678 (5th Cir. 1975); *Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir. 1971).

The notice requirement under the ADEA is a practical one. "It does not call for ritualistic incantation, and should not be subjected to the searching scrutiny once accorded common law pleadings." *Bihler v. Singer Co.*, 710 F.2d 96, 101 (3d Cir. 1983) (dissenting opinion, citing *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 283 (8th Cir. 1983)).

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[7] *See* Petitioners' Brief, p. 14.

In this case, the trial court and the appellate court agreed that Whalen's charge was sufficient under the specific facts of the case.

> Plaintiff's grievance was not a simple discharge-because-of-age case; it was more complex because of the Defendants' concerted arrangement to fire all the URE employees and hire back only those of their choosing. . . . The court concludes the OHRC could have perceived the inherent complexity of plaintiff's complaint by statements in the age complaint affidavit that "these entities acted in concert to unlawfully terminate my employment on the basis of age."

Order Denying Defendants' Motion for Summary Judgment, Petitioners' Appendix at A-18 & n.17.

The district court found that Whalen satisfied the administrative charge requirement under Section 626(d). Whalen's charge identified each of the Petitioners as prospective respondents, generally described the acts which Whalen alleged to be discriminatory, and was like or reasonably related to the allegations ultimately contained in the complaint filed in federal district court.

Neither the Tenth Circuit nor the trial court held that Whalen was excused from filing a charge with the EEOC before bringing an action in federal court. Nor did the lower courts hold that the Petitioners need not be named in the charge or that the allegations in the complaint need not be related to those raised in the charge. The Petitioners suggest that this case represents a conflict among the circuits with respect to the charge filing requirements under the ADEA. The Petitioners' argument is valid only if this Court accepts the Petitioners' version of the facts

and rejects the factual determinations made in the district court and adopted by the Tenth Circuit.

This Court has consistently ruled, absent an exceptional showing, that it will not undertake a review of factual determinations in which the lower courts have concurred. *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980). Because the Petitioners' request for a writ of certiorari depends upon just such a review, it should be denied.

B. Under the ADEA, a plaintiff need only file a charge of discrimination and wait for the expiration of the 60-day deferral period before commencing suit in federal court.

The Petitioners imply that Whalen had an obligation to proceed through administrative channels in an attempt to settle his dispute with the Petitioners prior to bringing an action in federal court. Some courts have held that the EEOC has an obligation to first provide notice and attempt to conciliate before resorting to litigation. *See Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1338-39 (10th Cir. 1979). However, even under Title VII, with its stringent administrative regulations, it is not required that a *private* plaintiff do more than comply with the charge filing requirement. In *Beverly v. Lone Star Lead Construction Corp.*, 437 F.2d 1136 (5th Cir. 1971), cited by the Petitioners in support of their conciliation argument, the court recognized that since a private plaintiff is unable to influence EEOC action it cannot be penalized for the EEOC's failure to conciliate. *Id.* at 1139.

The charge filing requirements and the 60-day deferral period under Section 626(d) are intended to provide

the EEOC with sufficient *opportunity* to eliminate unlawful practices through informal conciliation. The district court and the court of appeals determined that Whalen had met his obligations in this regard and that the charge filed with the EEOC contained sufficient information to permit the agency, had it so chosen, to notify the Petitioners of Whalen's allegations and to initiate conciliation. *Order Denying Defendants' Motion for Summary Judgment,* Petitioners' Appendix at A-19.

Whalen made every reasonable attempt to activate the EEOC's notice and conciliation procedure. The failure of the EEOC to take advantage of this opportunity for conciliation or even to notify each of the respondents named in Whalen's charge has absolutely no effect upon *his* ability to maintain an action after expiration of the deferral period. *Albano v. Schering-Plough Corp.,* 912 F.2d 384, 388 (9th Cir. 1990); *Stearns v. Consolidated Management, Inc.,* 747 F.2d 1105 (7th Cir. 1984); *Smith v. Sentry Insurance,* 674 F. Supp. 1459 (N.D. Ga. 1987).

II. The United States Court of Appeals for the Tenth Circuit correctly held that sufficient evidence was presented to the jury to support its finding that Whalen had made his interest in the position of Controller known to the Petitioners.

The Petitioners state that the decision of the Tenth Circuit is in conflict with the decisions of other circuits in that the Tenth Circuit did not require that Whalen prove, as a part of his prima facie case, that he either applied for

or otherwise made his desire for the position of Controller known to the Petitioners.[8] This is patently untrue.

This issue was submitted to the jury at trial and addressed by both the district court and the court of appeals in the following manner:

> Employment discrimination law does not require that a plaintiff formally apply for the job in question. Rather, the law requires either that the employer be on specific notice that the plaintiff seeks employment or, where informal hiring procedures are used, that the plaintiff be in the group of people who might reasonably be interested in the particular job . . . Mr. Hill testified that no formal employment application procedures were followed. In addition, Mr. Whalen testified that he informed Mr. Skaff when he left his job as Controller that he needed work. ***A jury could reasonably infer from this evidence that even without a formal job application, Terex officials were on specific notice that Mr. Whalen was interested in the job of Controller.***

Opinion of the United States Court of Appeals for the Tenth Circuit, (emphasis added), Petitioners' Appendix at A-5 to A-6.

> This Court, in its earlier Order filed April 17, 1990, at fn. 10, commented that "Defendants' tongue-in-cheek proposition that Plaintiff never applied for a job with the new company is disingenuous in light of the deposition testimony of the new entity's new president, Frank Hill . . . ". The crux of Hill's testimony was that there was

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[8] *See* Petitioners' Brief, p. 19.

> no need for anybody to apply with URI since the URE employees were told if they did not receive severance pay on July 14, 1988, they were to report to work for URI on July 15, 1988. Defendants have failed to provide any trial evidence which refutes this. In fact, Whalen's own trial testimony fully supports that no one "in fact applied for the job for which they were hired at Unit Rig, Inc." Defendants' argument on this issue is no less disingenuous as part of their motion for judgment *non obstante veredicto.*

Order Denying Defendants' Motion to Reconsider, (citation omitted), Respondent's Appendix at A-2 to A-3.

The district court properly instructed the jury that Whalen was obligated to establish, as an essential element of his claim, that "he applied for or made known to the defendants his interest in the job, but was denied the job." *Trial Transcript, pp. 639-40,* Respondent's Appendix at A-10. Whether Whalen satisfied this element of his prima facie case was a factual issue decided by the jury on the basis of the evidence presented at trial. The decisions of the district court and the Tenth Circuit merely hold that the evidence was sufficient to support the jury's verdict and, presumably, the jury's determination that Whalen had made his desire for employment sufficiently known to the Petitioners. The Petitioners' argument is no less "disingenuous" here than it was when first presented to the district court.

CONCLUSION

The Petitioners have failed to show the existence of a conflict among the circuits resulting from the decision of the Tenth Circuit in this case. Furthermore, there has been no "extraordinary showing" upon which to justify the exercise of this Court's discretionary review over factual determinations in which both lower courts concur. For the reasons stated herein, the Respondent requests that the Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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Counsel for Respondent

APPENDIX

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Appendix A Order Denying Defendants' Motion to Reconsider, *John W. Whalen v. URE Co., formerly Unit Rig and Equipment Company, Unit Rig, Inc., MRL Acquisition Corp., and Terex Corporation,* Case No. 88-C-1667-B (N.D. Okla., March 29, 1991)..... A-1

Appendix B Trial Transcript – Jury Instructions, *John W. Whalen v. URE Co., formerly Unit Rig and Equipment Company, Unit Rig, Inc., MRL Acquisition Corp., and Terex Corporation,* Case No. 88-C-1667-B (N.D. Okla., December 11, 1990).....A-7

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN W. WHALEN Plaintiff, vs. URE CO., a Texas corporation, formerly UNIT RIG AND EQUIPMENT COMPANY, a Texas corporation; UNIT RIG, INC., a Delaware corporation; MRL ACQUISITION CORP., a Delaware corporation; and TEREX CORPORATION, a Delaware corporation, Defendants.	Case No. 88-C-1667-B (Filed March 29, 1991)

ORDER

This matter comes on for consideration upon Defendants' Motion For Judgment Notwithstanding The Verdict Or, In The Alternative, Motion For New Trial.

Motions for Judgment n.o.v. should be granted only where the evidence so conclusively favors one party that reasonable persons would be unable to arrive at a different result. ***Western Plains Service Corp. v. Ponderosa Development Corp.,*** 769 F.2d 654 (10th Cir. 1985). Judgment n.o.v. "should be cautiously and sparingly granted." ***Lucas v. Dover Corp.,*** 857 F.2d 1397 (10th Cir. 1988), quoting ***E.E.O.C. v. Prudential Federal Sav. & Loan Ass'n,*** 763 F.2d 1166 (10th Cir. 1985). In reviewing the

evidence, the Court must draw all reasonable inferences in favor of the party opposing the motion and may only grant the motion when the evidence points but one way and is susceptible of no reasonable inferences which may sustain the opposing party's position. ***E.E.O.C. v. Prudential Federal, supra.***

Defendants present five issues in support of their motion Judgment n.o.v., which will be discussed *seriatim.*

1. Plaintiff failed to make out a *prima facie* case of age discrimination for failure to hire because Plaintiff never applied for a position with Defendants. This is the same premise used by Defendants in moving for summary judgment. This Court, in its earlier Order filed April 17, 1990, at fn.10, commented that "Defendants' tongue-in-cheek proposition that Plaintiff never applied for a job with the new company is disingenuous in light of the deposition testimony of the new entity's new president, Frank Hill . . . ". The crux of Hill's testimony was that there was no need for anybody to apply with URI since the URE employees were told if they did not receive severance pay on July 14, 1988, they were to report to work for URI on July 15, 1988. Defendants have failed to provide any trial evidence which refutes this. In fact, Whalen's own trial testimony fully supports that no one "in fact applied for the job for which they were hired at Unit Rig, Inc".[1] See ***Singer v. Uni-Marts,*** 37 F.E.P. Cases 1197 (D.C.Pa.1985). Defendants' argument on this issue is no less disingenuous as part of their motion for judgment

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[1] Trial transcript of Plaintiff's testimony, page 39, lines 7-16.

non obstante veredicto. The Court concludes this issue provides no basis to grant Defendants the relief sought.

2. Defendants' next issue is that they met their burden of articulating a non-discriminatory reason for their failure to retain Whalen as Controller and therefore shifted the "pretext" burden back to Whalen. The reason articulated was that Defendants wanted their own people in the top financial positions. The jury could have believed Defendants wanted their own "young" people in the top financial positions, particularly Controller.[2] The Court concludes there was ample evidence for the jury to make a determination that the articulated reason was indeed pretextual.

3. Defendants' third issue is that Plaintiff failed to prove that age was a determinative factor in Defendants' decision not to hire him and that Defendants' proffered reason was pretextual. This was in part considered above. Defendants' further articulated reason for not hiring Whalen was that they intended to merge the positions of Controller and Financial Vice-President. The short life of this merger, approximately one week, lends credence to its pre-textual probabilities, presumptively not lost on the jury.

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[2] Evidence presented indicated new President Frank Hill informed Unit Rig's South African division managing director that Whalen was no longer the Controller of Unit Rig and that Hill intended to hire a "young one". Approximately two weeks after the effective date of the acquisition 29 year old William Schein was hired as Controller, being recommended as "a young, inexperienced guy who had never seen the inside of a factory before."

The other aspect of this issue, proof that age was a determinative factor, implicates the Paymaster and RIF lists, the former being organized by age, the eldest at the top. The court's previous Order denying Defendants' summary judgment motion addressed the potential impact of these lists, as follows:

> The Court must consider the significance *vel non* of the RIF list and the Paymaster-Age list, and what significant inferences a fact finder might realize therefrom. Of the top eight names (oldest) on the Paymaster-Age list, six were not rehired (lowered to five when Laven, age 63, was retained under a designation of "retired"). Also, from the top 1/3rd of the Paymaster-Age list, 12 were fired while only 5 were fired from the bottom 1/3rd (youngest) of the list.
>
> The Court concludes the RIF list use and the Paymaster-Age list use, although not essentially disputed, are capable of conflicting inferences by a fact finder *vis-a-vis* indicia of age discrimination.

In its earlier Order the Court referenced a similar but distinguishable case, ***Lucas v. Dover Corp., Norris Div.***, 857 F.2d 1397 (10th Cir. 1988) where this Court was affirmed after entering Judgment n.o.v. in favor of an employer-defendant. In ***Lucas*** the Appellate Court made several observations *apropos* the instant case:

> Finally, the statistics concerning all supervisory employees terminated in the reduction in force do not assist plaintiffs' cause. Those statistics show that of the eighteen employees terminated, eleven were under age forty while seven were over that aged [sic]. While the numbers of employees in the statistical analysis here are

> quite small, and therefore must be evaluated with caution, what evidentiary value they have suggests that older employees were not treated unfavorably.
>
> * * *
>
> In short, while plaintiffs may disagree with Dover's evaluation of who was the best qualified employee to fill the consolidated positions, as long as a jury had no reasonable basis for determining that age was a determining factor in those evaluations, the jury verdict for plaintiffs cannot stand."

In the present case the Court concludes there was sufficient statistical bases, from the two lists and testimony given at trial, for a jury to reasonably conclude that older employees, including the Plaintiff, were treated unfavorably due to their ages. In short, the Court concludes the jury had a reasonable basis for determining that age was a determining factor in Defendants' decision not to hire Whalen.

Defendants' issues 4 and 5[3] are issues of law decided in the Court's earlier Order denying summary judgment. The Court concludes there is no reason to depart from its earlier conclusions on these issues and the same offer no basis for entering Judgment n.o.v.

Defendants' Alternative Motion for New Trial is principally hinged upon the Court's alleged error is allowing

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[3] Issue 4 is: because Defendants were not listed as respondents in the OHRC documents filed by Plaintiff and they never received notice of any charge, J.N.O.V. is appropriate. Issue 5 is: because Plaintiff did not allege "failure to hire" in his OHRC documents, J.N.O.V. is appropriate.

into evidence the two lists discussed above. The Court's discussion of the relevance of these evidentiary items, and the jury's verdict consistent with the inferences permissible therefrom, incline the Court to deny Defendants' Alternative Motion for New Trial.

IT IS SO ORDERED this 29th day of March, 1991.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

* * *

[p. 635] (NOON RECESS)

THE COURT: Be seat, seated, please. Are the parties ready?

MR. MANN: The Plaintiff is ready, Your Honor.

MR. HAGEDORN: Defendant is ready, Your Honor

THE COURT: All right, thank you.

Ladies and gentlemen of the jury, it's now time for the Court to advise you of the law that you're supposed to apply in this case, and I ask you, if you will, to please pay close attention to the instructions I'm going to give you here as you have during the other portion of the trial because you're going to have to consider all of these instructions in [p. 636] your deliberations.

You've heard the evidence and the arguments of the counsel, and the Court now instructs you on the law governing the case.

Understand that although you as the jurors are the sole judges of the facts, you're duty bound to follow the law that I state to you in these instructions and apply this law that I give to you to the facts as you find them from the evidence that has been presented.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict in this case upon any other view of the law than that which I state to you in these instructions.

Now, you shouldn't single out any certain sentence or any individual point or instruction and ignore the others, but you're to consider all of these instructions as a whole and you're to regard each instruction in light of all of the others.

Now, concerning the claims and defenses here. The plaintiff, Mr. Whalen, brings this action for alleged breach of the Age Discrimination in Employment Act. He claims that at age 62 years the defendants refused to hire him as a controller of Unit Rig, Inc. (URI) following the defendants' purchase of that business from plaintiff's former employer, Unit Rig and Equipment Company (URE). Plaintiff claims that [p. 637] he was qualified for the position and that the defendants instead hired a much younger employee to fill it. The plaintiff, Mr. Whalen, claims that the defendants' conduct constitutes a willful violation of the Age Discrimination in Employment Act and that he's entitled to back pay with all employment benefits until December 31st of 1990, that is December 31st of this month.

Now, the defendants, in response, deny the plaintiff's age was a determining factor in not hiring him. The defendants assert that their decision not to hire the plaintiff was based upon legitimate business reasons and not because of Mr. Whalen's age. The defendants state that they desired to install their own top financial management to operate the company that they had just acquired, which had a history of significant financial and operating problems, and this is the reason the plaintiff was not hired. The defendants assert the plaintiff is not entitled to recover herein on his age discrimination claim.

Now, the foregoing recitation as to the claims of the plaintiff herein and the defenses of the defendants is given to you simply to define the issues to be tried between the parties, and such statements do not constitute proof of any fact in evidence in the case.

Concerning the burden of proof. The burden of proof is upon the plaintiff to establish or prove the material alle-[p.638] gations of his complaint by a preponderance of the evidence, and if the plaintiff fails to discharge this responsibility, your verdict should be for the defendants and against the plaintiff.

Concerning burden of proof and preponderance of the evidence. In a civil lawsuit, like this one, there are requirements as to which party is to prove to you certain things. This is called the burden of proof.

When I say that a party has the burden of proof on any proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded, considering all of the evidence in the case, that the proposition on which such party has the burden of proof is more probably true than not true.

Concerning the applicable statutes that are involved here, that is the federal statutes. You are instructed that Title 29, United States Code, Sections 621 to 634 and at Section 623(a)(1), the Age Discrimination in Employment Act provides in pertinent part and I quote:

"It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual because of such individual's age."

Title 21, United States Code, Section 623(f)(1) and (3), the Age Discrimination in Employment Act, provides in [p. 639] pertinent part:

"It shall not be unlawful for an employer to take any action otherwise prohibited under subsection (a) of this section where the differentiation is based on reasonable factors other than age."

You are further instructed that Title 29, United States Code, Section 631, provides:

"Individuals at least 40 but less than 70 years of age.

"The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age."

Now, concerning the elements of the plaintiff's claim. In order to provide the essential elements of the plaintiff's claim, the burden is upon the plaintiff, Mr. Whalen, to establish by a preponderance of the evidence in this case the following facts:

First: That the plaintiff, Mr. Whalen, was at least 40 years of age but less than 70 years of age at the time URI failed to hire him. The age of the plaintiff, 62, at the time of URE's dissolution and URI's creation is not disputed by the defendants;

Second: That the plaintiff was qualified for the controller job that he was denied;

Third: That the plaintiff applied for or made known [p. 640] to the defendants his interest in the job, but was denied the job; and

Fourth: That the plaintiff was rejected in lieu of a younger person.

Each of the above elements must be established by a preponderance of the evidence in the case, and if any is lacking you must return a verdict in favor of the defendants.

Now, once the plaintiff has established the essential elements of his age discrimination, if he does, the burden of proof does not shift to the defendants, but the defendants being only required to come forward with some evidence that supports a legitimate nondiscriminatory reason for the plaintiff's failure to be hired.

If you are satisfied that the plaintiff has established the essential elements of his discrimination claim but the defendants have come forward with evidence that plaintiff was not hired because of reasonable factors other than age, the plaintiff must still bear the burden of establishing a case of discrimination by a preponderance of the evidence.

If you find the defendants have come forward with evidence that the plaintiff was not hired on the basis of some reasonable factor other than age, the plaintiff then has the burden of proving by a preponderance of the evidence that the reasons given by defendants for failure to hire were in fact a pretext to hide or mask age discrimination by the defendants.

* * *

Supreme Court, U.S.
DEC 2 6 1993

No. 92-1236

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

UNIT RIG INC., TEREX CORPORATION,
AND MRL ACQUISITION CORPORATION,

Petitioners,

v.

JOHN W. WHALEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF

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Reply to Brief in Opposition

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, a reply is necessary to address arguments first raised in Respondent's Brief in Opposition and to address other misstatements, misrepresentations and misleading arguments contained in Respondent's Brief.

Petitioners respectfully disagree with Respondent's contention that Petitioners incorrectly included the citation to 42 U.S.C.A. § 2000e-5 in the Petition for Writ of Certiorari under "Statutory And Regulatory Provisions." See Respondent's Brief at p. 2. This Court has held that it is proper to apply case law developed under Title VII to analogous situations arising under the ADEA. See infra at pp. 9-10. Petitioners cited Title VII cases which involved filing requirements to demonstrate the difference now existing among the circuits where the employee relies only on an "Age Complaint Intake Questionnaire" ("Intake Questionnaire"), and an "Age Complaint Affidavit" ("Affidavit") but fails to allege a proper charge in the "Age Official Complaint Form" ("Official Complaint").

Respondent suggests that the filing requirements of charges under the ADEA are in "stark contrast to the rigid requirements of Title VII." See Respondent's Brief at p. 9. A comparison of the statutory and regulatory provisions reveals that the provisions relating to filing procedures for ADEA and Title VII are virtually identical with few exceptions, notably, the requirement of a right to sue letter in Title VII cases before filing an action in the district court, as opposed to a 60 day waiting period in ADEA cases from the date of the filing of a charge with the EEOC. See infra at pp. 9-10. The forms of the filing documents provided by the OHRC, i.e., Intake Questionnaire, Affidavit, and Official Complaint, forms are identical whether the charge is under the ADEA or Title VII. The regulations relating to the form of the charge are different only in that the Title VII charge must be verified. See infra at pp. 9-10. Incidentally, the Age

Complaint Affidavit form furnished by OHRC to Respondent was verified.

Keeping in mind that Respondent was represented by experienced counsel, (see infra at pp. 7-8) it is undisputed that in the Intake Questionnaire Respondent stated that "he was terminated from employment of Unit Rig and Equipment Company" ("URE") (emphasis added). In his Affidavit, Respondent stated the alleged discriminatory action was his "discharge" from URE as an accountant because URE, MRL Acquisition Corporation ("MRL"), Terex Corporation ("Terex"), and Unit Rig "acted in concert to unlawfully terminate (his) employment on the basis of [his] age." In his Official Complaint filed with OHRC after he commenced his action in federal court, Respondent only named his former employer, Unit Rig and Equipment Company, and stated only that he "was discharged from [his] position as controller" for age discrimination. (emphasis added)

Reply To Questions Presented For Review And Reply To Summary Of Reasons For Denying Petitioners' Request

The mandate of Congress with respect to the requirements of the ADEA for notice and settlement of disputes through conciliation, conference and persuasion and the difference in the circuits requiring compliance therewith are discussed in the Petition for Writ of Certiorari. By granting the Petition for Writ of Certiorari this Court will be setting the standard for litigants, lawyers and courts in all circuits to carry out the mandate of Congress with respect to the "conditions precedent" to filing an action under the ADEA in the federal courts. This Court's direction is needed to ensure equal protection under the law that only after notice of the charge to prospective defendants and after the opportunity for settlement of disputes through conciliation, conference and persuasion will a civil action be commenced under the ADEA.

In Respondent's Brief in Opposition, he contends that Petitioners' request for a writ of certiorari should be denied because the Tenth Circuit, in affirming the judgment of the district court, correctly and consistently applied the law and regulations governing administrative filing requirements under the ADEA to the findings of fact made in the district court. See Respondent's Brief at p. 5. That statement is not correct for the reason that neither the district court nor the appellate court, nor the Respondent in his Brief, discussed the charge contained in the Official Complaint in this case and the distinction between the Official Complaint charge and the charge contained in the Intake Questionnaire and Affidavit. The Official Complaint charge in this case is insufficient to meet the minimal conditions precedent to filing an action in the Seventh Circuit under Steffen and other circuits which are in conflict with the Tenth Circuit on this issue. See Petition for Writ of Certiorari at pp. 12-14.

Respondent criticizes Petitioners' reliance on the case law and regulations relating to Title VII and summarily dismisses the issue with respect to Respondent's OHRC documents with the statement that "all that is required of Plaintiff under the ADEA is to file a charge in writing identifying the prospective respondents and generally describing the acts alleged to be discriminatory." (emphasis added) (citing 29 C.F.R. § 1626.8(b) and Foster v. National Bank of Bossier City, 857 F.2d 1058 (5th Cir. 1988)). See Respondent's Brief at p. 6. This argument would be appropriate in a case where the issues relate to timely filing, as in Foster, but misses the mark where, as in the instant case, the Official Complaint charge fails to both identify the prospective respondents and to describe the acts, generally or otherwise, which are alleged to be discriminatory.

In Foster the complainant without legal representation wrote a letter to the EEOC setting forth information with respect to his claim under the ADEA. Foster precedential authority is limited solely to the issue of timely filing of the

charge. The court only "determined that Foster filed a timely charge as required by the ADEA." See 857 F.2d at 1061.

In Steffen v. Meridian Life Insurance Co., 859 F.2d 534 (7th Cir. 1988), the court addressed the issue concerning the difference between the charge contained in the Intake Questionnaire and Affidavit and the charge contained in the Official Complaint. The court decided two issues; one was "whether Steffen satisfied the ADEA's charge-filing requirement," (Id. at 541) so as to determine whether Steffen had filed his charge with the EEOC within the limitation period after the alleged discriminatory act occurred. Id. at 542. The court also decided whether Steffen's retaliatory discharge claim failed as a matter of law because it did not fall within the scope of the charge Steffen filed on December 1, 1983 in his Official Complaint. Id. at 544. The court stated as follows:

> The purpose of the charge-filing requirement is to provide the EEOC with sufficient information to notify an employer that it has been charged with discrimination and to provide the EEOC with the opportunity to investigate the alleged unlawful practice as well as to provide the EEOC with the opportunity to eliminate any unlawful practice through informal conciliation.

The court held that for purposes of timely filing, Steffen's Intake Questionnaire contained enough information to satisfy the regulations in that it named the respondent and stated that he was demoted because of his age. The court further stated:

> Contrary to Steffen's arguments, however, the EEOC's regulations make clear that, while a charge is "sufficient" if it names the respondent and generally alleges discrimination, not all documents containing such information are charges. The court also noted:

> Under Steffen's interpretation of the regulations, virtually every completed Intake Questionnaire (and probably most phone messages) would fall within the definition of a charge. But the EEOC does not routinely treat Intake Questionnaires as charges.

With respect to the Official Complaint charge the court held that Steffen's retaliation claims did not fall within the scope of the charge submitted to the EEOC; that in filling out his charge, he checked the box marked "Other" and specifically wrote in "Age,"; and, that he complained in the body of the charge that he had been replaced by a younger man and later terminated, all because of his age.

Steffen is instructive on the issues in the instant case and clearly states the law in the Seventh Circuit and other circuits, which is in conflict with the Tenth Circuit decision in this case. See Petition for Writ of Certiorari at pp.15 and 16.

In the second paragraph on Page 1 of Respondent's Brief in Opposition he states that the issues decided by the trial court and affirmed by the Tenth Circuit were solely on the basis of the unique facts and circumstances present in this case and that the decision is of no real significance in the administration of future ADEA claims and has little or no precedential value.

Contrary to Respondent's assertion, the "unique facts and circumstances" which this Court must consider relate to the lower courts' interpretation of the conditions precedent to filing a lawsuit under ADEA and the Tenth Circuit's decision in this case, which is in conflict with the other circuits. See Petition for Writ of Certiorari at pp. 12-19.

The following facts and issues that were not addressed by the lower courts nor by Respondent in his Brief are: (1) that Petitioners had no notice of the administrative proceedings; (2) had no opportunity to settle this dispute through conciliation, conference and persuasion; (3) were not named or charged as a Respondent in the Age Official Complaint Form; (4) the Respondent was represented by experienced

lawyers in the administrative proceedings; (5) that each document complained only of discharge, an impossibility for Petitioners who never employed Respondent; and, (6) Respondent's Age Official Complaint Form was prepared and filed by Respondent with the help of his lawyers. Respondent mistakenly believes the above facts and issues to be of no significance to this Court.

The significance of the above facts and issues is demonstrated by the trial court's questioning of Respondent's attorneys regarding the notice issue. [1]

The importance to Petitioners and others faced with these same facts and issues is that in the Seventh Circuit under Steffen and in other circuits, Respondent's case would have been dismissed. Now, in the Tenth Circuit under the decision in the instant case, the foregoing conditions precedent to filing an action under the ADEA are not required.

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[1] **MR. CREMIN**: Your Honor, one other document -- I hate to keep adding this -- but this shows that he said Walter Jackson laid him off, and it's more to the effect of who would have been getting this information.

THE COURT: That will be added as Court's Exhibit No. 7 so an appellate court can see what was going on in reference to the confusion of why the OHRC and the EEOC is told about the potential age discrimination claim against MRL Acquisition Corp., Terex and Unit Rig, Inc. but none of those organizations or companies were advised of it.

Before we leave this subject, since throughout this time, as I understand it, Mr. Mann, your client Mr. Whalen was being represented by your law firm, by you and Mr. Nelson -- am I correct in that?

MR. MANN: Yes, sir, that is correct.

THE COURT: Why weren't any of these documents that were sent to OHRC and sent to EEOC relative to MRL Acquisition Corporation, Terex and Unit Rig, Inc., why weren't any of those sent to those entities? Why didn't you just make a copy of them and send them over to them whether the EEOC did it or not?

MR. MANN: Your Honor, I've handled a lot of these, usually on the defendant's side. My client has never ever received a charge of discrimination from any complaining party. The way this works is you go down to the --

THE COURT: I don't care what your client's ever received.

Reply To Reasons For Denying The Petition For Writ Of Certiorari

Respondent's arguments under this section that "both lower courts did consider the Petitioners' arguments concerning the sufficiency of Respondent's charge and rejected each and every one," is not supported by the facts and law in this case. Neither of the lower courts nor Respondent addressed the issues relating to the Official Complaint charge. The only issues addressed by the lower courts with respect to the OHRC filing documents were limited to the Intake Questionnaire, Affidavit, and letter of Rosenstein, Fist & Ringold to OHRC dated October 31, 1988. See Respondent's Brief at p. 9. These documents without the Official Complaint may meet the timing requirements under the ADEA, but do not meet the charge requirements for the Official Complaint under the ADEA in the Seventh Circuit under Steffen and in other circuits. See Petition for Writ of Certiorari at pp. 12-19.

In fact, the Intake Questionnaire, Affidavit, and letter from counsel without the Official Complaint are insufficient upon which to later state a legal action under the ADEA. The charge asserted by Respondent in the Affidavit submitted as part of the Intake Questionnaire was couched in terms of a conspiracy between Petitioners and URE, who Respondent claims "acted in concert to unlawfully terminate [his] employment on the basis of [his] age."[2] Conspiracy to violate the ADEA is not a proper charge under the ADEA.[3]

Additionally, Respondent misstates Petitioners in suggesting that "Petitioners ask this Court to hold that a 'charge' under the ADEA cannot be made without the filing of an Official Complaint." (emphasis added). See Respondent's Brief at p. 9. Respondent's statement begs the

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[2]There is no dispute as to the language in the Intake Questionnaire and Affidavit.

[3]See Great American Federal Savings-Loan v. Novotny, 442 U.S. 366 (1979); Spencer v. Banco Real, S.A., 87 F.R.D. 739 (S.D. N.Y. 1980).

question because Respondent did file the Official Complaint with the help of his lawyer as pointed out in the Petition for Writ of Certiorari.[4]

In support of his contention that both lower courts considered the Petitioners' arguments concerning the sufficiency of Respondent's charge and rejected each and every one, Respondent quotes the findings of the trial court which were adopted by the Tenth Circuit in its order on Petition for Rehearing.[5] Despite its being raised in the Motion for Summary Judgment and for Directed Verdict, no reference by the trial court is even made to the lawyer assisted Official Complaint filed with OHRC. The blame for the OHRC's failure to notify Petitioners that they had been charged with discrimination under the ADEA was directed at the agency even though the Respondent was represented by counsel experienced in ADEA and Title VII matters and never made any complaint about the only action which Petitioner could have taken, i.e., refusal to hire.

Reply To Statutory and Regulatory Provisions

Respondent contends that Petitioners incorrectly include 42 U.S.C.A. § 2000e-5 (Title VII) under "Statutes And Regulations Involved." Respondent agrees "that courts have applied case law developed under Title VII to analogous situations arising in employment discrimination suits brought

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[4]See Petition for Writ of Certiorari at 16 footnote 2; see also Cano v. United States Postal Service, 755 F.2d 221 (1985) and Jones v. Baskin, Flaherty, Elliot and Mannino, 738 F. Supp. 937 (W.D. Pa. 1989) (1st Cir. 1985).

[5]Whalen v. Unit Rig, Inc., 974 F.2d 1248 (10th Cir. 1992). In its opinion filed September 2, 1992 the court refused to address the "legal sufficiency of the documents Mr. Whalen filed with the OHRC . . . [b]ecause the issue was not properly raised below." Id. at 1251. In its order on Petition for Rehearing the court first conceded that it had erred and the issue was raised below but then concluded "that the trial court was correct in its analysis and conclusion contained in its Order on pages one through seven." Id. at 1254.

under the ADEA," but not "where clearly different procedures exist." (Citing Lorillard v. Pons, 434 U.S. 575, 584, (1978) where the court held that "in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant difference.") See Respondent's Brief at p. 2. In Lorillard, the court also stated that "[t]here are important similarities between the two statutes, to be sure, both in their aims -- the elimination of discrimination from the workplace -- and in their substantive prohibitions."[6]

Because Petitioners cite Title VII cases in support of issues raised in the Petition for Writ of Certiorari, 42 U.S.C.A. § 2000e-5, was included under "Statutes And Regulations Involved" to demonstrate the "important similarities" between the provisions of Title VII and 29 U.S.C.A. § 626(d) (ADEA) which contain provisions relating to "Filing of charge with Commission; timeliness; conciliation, conference, and persuasion." Both § 626(d) and § 2000e-5e require the filing of a charge by a person claiming unlawful discrimination by an employer. Both acts require that the Commission notify all persons named in such charge. Both acts require the Commission to "seek" or "endeavor to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."

With respect to the "Form of charge" and "Contents of charge; amendment of charge," the provisions in the Code of Federal Regulations for ADEA (§ 1626.6 and § 1626.8) are substantially the same as Title VII (§ 1601.9 and § 1601.12), except that Title VII requires the charge to be verified.[7]

Because the issues before this Court relate to the "charge" and the opportunity for "conciliation, conference and persuasion," Title VII cases on these issues are cited by Petitioners. Indeed, Respondent cites Title VII cases in

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[6]434 U.S. at 584; See also Oscar Mayer & Co. v. Evans, 441 U.S. 750, (1979).

[7]See Petitioners' Brief, pp. 3, 4 for § 1626.6 and 1626.8; Title VII.

support of his arguments in opposition to the Petition for Writ of Certiorari.

Conclusion

Contrary to Respondent's assertion, Petitioners' Statement of the Case in the Petition for Writ of Certiorari clearly sets forth the issues to be decided by this Court and demonstrates the importance of this Court granting the Petition for Writ of Certiorari.

Petitioners respectfully submit that for the reasons stated herein and in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

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